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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

*Petitioners,*

vs.

BEN COOPER, INC.,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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February 12, 1991

## QUESTIONS PRESENTED

Congress's core/non-core distinction in 28 U.S.C. § 157 and the lack of clarity as to the bankruptcy court's authority to conduct jury trials have led to confusion among the courts over the proper scope of the bankruptcy court's jurisdiction. This case presents two questions integrally related to significant constitutional rights threatened by the Second Circuit's decision below.

I. Whether the post-petition status of the contract underlying this case requires a core designation pursuant to 28 U.S.C. § 157 even though the contract dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims.

II. Whether a jury trial of this case in the bankruptcy court comports with article III and the seventh amendment of the Constitution when an article I judge presides over the trial subject only to appellate review in the district court.

## LIST OF PARTIES AND RULE 29.1 LIST[1]

Petitioner the Insurance Company of the State of Pennsylvania is a subsidiary of American International Group, Inc., an insurance holding company which is parent to numerous domestic property/casualty insurance companies.

Petitioner Kerwick & Curran, Inc. has no parents, subsidiaries or affiliates.

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[1] Kalvin-Miller International, Inc. is a party to the proceedings below and has not joined in this petition.

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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1990**

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*Petitioners,*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

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## PETITION FOR A WRIT OF CERTIORARI

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The Petitioners, the Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., respectfully pray that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Second Circuit, originally entered in the above-entitled proceeding on February 7, 1990, and reinstated by the opinion and

judgment of the Second Circuit dated January 22, 1991.

## OPINIONS BELOW

The opinion and order of the Court of Appeals for the Second Circuit, dated January 22, 1991, reinstating its opinion and judgment dated February 7, 1990, appears in the Appendix at A-1.[2]

The judgment of the Supreme Court vacating the Court of Appeals' opinion and judgment is reported at 111 S. Ct. 425 (1990). It appears in the Appendix at A-10.

The opinion and judgment of the Court of Appeals for the Second Circuit, dated February 7, 1990, is reported at 826 F.2d 1394 (2d Cir. 1990). It appears in the Appendix at A-12.

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[2] References to "A- " followed by a page number indicate reference to the Appendix attached hereto.

The oral opinion and order of the United States District Court for the Southern District of New York has not been reported. It is reprinted in the Appendix at A-34.

The oral opinion and order of the United States Bankruptcy Court for the Southern District of New York determining that this adversary proceeding is core has not been reported. The pages of the transcript of the hearing in which the ruling appears are reprinted in the Appendix at A-48.

The oral ruling of the United States District Court for the Southern District of New York on May 31, 1989 directing the Bankruptcy Court to determine whether this adversary proceeding is core has not been reported and is not included in the Appendix.

## JURISDICTION

Petitioners seek review of the opinion and judgment of the Court of Appeals for the Second Circuit, dated February 7, 1990, which was vacated by order of the Court on November 13, 1990, and, on remand, reinstated by the opinion and order of the court of appeals, dated January 22, 1991. (A-1, A-12.)

The jurisdiction of this Court to review the order of the Second Circuit is invoked under 28 U.S.C § 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this petition for a writ of certiorari are:

U.S. Const. art. I, § 8, cl. 4.

> Congress shall have the Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States.

U.S. Const. art. III, § 1.

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. amend. VII.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law.

The statutes involved in this petition for certiorari are 28 U.S.C. § 157, 28 U.S.C. § 158, and 28 U.S.C. § 1411, and are reprinted in the Appendix at A-52, A-57, and A-60, respectively.

## STATEMENT OF THE CASE

Ben Cooper, Inc. ("Cooper"), a costume import/manufacturing business, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code in April, 1988. Thereafter, Cooper employed the services of two brokers, co-petitioner Kerwick & Curran, Inc. ("KC") and Kalvin-Miller International, Inc. ("K-M"), to procure various insurance policies. As a result of the brokers' efforts, The Insurance Company of the State of Pennsylvania ("ICSP") issued property and general liability insurance coverage (the "Policy") to Cooper, as debtor-in-possession, in October, 1988. On January 6, 1989 there was a small fire at Cooper's Georgia warehouse (the "Loss"). The claim submitted by Cooper to ICSP concerning the Loss led to the dispute underlying this matter.

In April, 1989 ICSP commenced an action in the state court seeking, *inter alia*, to void the Policy on the ground that its issuance had been induced by material misrepresentation. ICSP's pleading also sought a declaration that there was no liability under the Policy because of Cooper's misrepresentations and fraudulent exaggerations relating to the Loss. Simultaneously with instituting its state court action, ICSP sent Cooper a notice of cancellation of the Policy based upon the same misrepresentations.

On May 9, 1989 Cooper commenced an adversary proceeding in the United States Bankruptcy Court for the Southern District of New York (the "Adversary Proceeding") seeking various forms of relief against ICSP, KC and K-M. In its complaint, Cooper alleged that ICSP was

liable under the Policy for the Loss. Alternatively, Cooper alleged that if the court found the Policy to be void *ab initio*, its brokers, KC and K-M, would be liable to it for failing to place the insurance properly. Cooper also moved in the bankruptcy court to enjoin prosecution of ICSP's state court action, contending that the controversy was a core matter which should be adjudicated in the bankruptcy court. Additionally, Cooper sought to stay ICSP's attempted cancellation of the Policy.

In its answer to Cooper's complaint, ICSP raised affirmative defenses based on material misrepresentations in the Policy's procurement and fraudulent exaggeration of the claim for the Loss, the same matters which ICSP had alleged in its state court action. ICSP demanded

a jury trial, as did KC and K-M in their answers.

The Honorable Cornelius Blackshear, U.S.B.J., granted Cooper the initial relief it had sought by motion. In a hearing held on May 17, 1989, Judge Blackshear ruled from the bench: He (1) enjoined the state court action; (2) stayed cancellation of the Policy; and (3) ordered expedited discovery.

Following the bankruptcy court's ruling, ICSP, joined by KC and K-M, moved in the district court for withdrawal of the reference of the Adversary Proceeding to the bankruptcy court. In a hearing on May 31, 1989, the Honorable John M. Walker, U.S.D.J., declined to hear ICSP's request for relief until the bankruptcy court made a specific determination of whether or not the matter was core. At Judge Walker's direction, oral argument

was heard on June 15, 1989 before Judge Blackshear who ruled from the bench that the Adversary Proceeding was core pursuant to 28 U.S.C. §§ 157(b)(2)(A) (estate administration) and (L) (confirmation of plans). (A-48.) At that time Judge Blackshear expressed skepticism as to whether ICSP and its co-defendants were entitled to a jury trial. He concluded, however, that since he had found the Adversary Proceeding to be core, the matter would remain within the bankruptcy court for plenary adjudication and fact-finding.

Following Judge Blackshear's ruling that the matter was core, ICSP, KC, and K-M moved in the United States District Court for the Southern District of New York for relief from the bankruptcy court's order. In an oral ruling on July 11, 1989 the Honorable Louis L.

Stanton, U.S.D.J., reversed Judge Blackshear's ruling, withdrew the reference to the bankruptcy court, abstained from exercising jurisdiction in the district court, and lifted the injunction of the state court proceeding. (A-34.) Judge Stanton also lifted the stay which had enjoined ICSP from canceling the Policy. The court found that the controversy, which concerned only state law issues as to an insurance company's liability for a loss sustained by the debtor-in-possession, was not rendered core merely because its resolution might bring funds into or otherwise affect administration of the estate. The court's withdrawal of the reference was based in part on the further finding that ICSP and its co-defendants were entitled to a jury trial. Judge Stanton concluded that the

requirement of *de novo* review in the district court would be incompatible with the conduct of a jury trial in the bankruptcy court.

Cooper appealed the district court's ruling to the United States Court of Appeals for the Second Circuit. The court of appeals reversed the district court and remanded the proceeding to the bankruptcy court. (A-12.) The court held that the proceeding was core because the underlying contract, the Policy, had been entered into after Cooper filed its bankruptcy petition. The Second Circuit found that resolution of the dispute would necessarily affect administration of the bankruptcy estate. The court further held that the defendants were entitled to a jury trial, and that the jury trial could take place in the bankruptcy court.

By petition dated May 8, 1990, petitioners sought a writ of certiorari to review the opinion and judgment of the court of appeals; the petition presented two issues: 1) Whether a dispute concerning a post-petition contract is a core matter under 28 U.S.C. § 157, even though such dispute could exist independent of the Chapter 11 bankruptcy proceeding and is based solely on state law claims; and 2) whether a jury trial of the case in the bankruptcy court would comport with article III and the seventh amendment of the Constitution, the same issues presented in this petition. Certiorari was granted on June 28, 1990.

Subsequent to the grant of certiorari, the United States intervened in this matter and submitted an answering brief. The intervenor raised an issue concerning the Second Circuit's

jurisdiction to have considered the appeal from the district court. By order dated November 13, 1990 this Court remanded the matter to the Second Circuit, vacating the previous judgment entered there and directing the court of appeals to address in the first instance the jurisdictional issue raised in the Supreme Court proceedings. By order dated January 22, 1991, the Court of Appeals for the Second Circuit held that it did have jurisdiction and reinstated its previous opinion and judgment. Review is now sought of the original judgment in respect of which certiorari was granted on June 28, 1990.

## REASONS FOR GRANTING THE WRIT

### I. THE SECOND CIRCUIT'S FINDING THAT A POST-PETITION CONTRACT IS NECESSARILY CORE IGNORES THIS COURT'S PRONOUNCEMENT IN *MARATHON* AND UNDERSCORES THE SUBSTANTIAL UNCERTAINTY THAT HAS RESULTED FROM CONGRESS'S FAILURE TO DEFINE "NON-CORE" UNDER THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The Court of Appeals for the Second Circuit agreed with the conclusion of the United States Bankruptcy Court for the Southern District of New York that an ordinary state law contract dispute between an insurance company and its insured in reorganization under Chapter 11 of the United States Bankruptcy Code is a core matter pursuant to 28 U.S.C. § 157(b)(2). The Second Circuit concluded that a contract dispute involving insurance of estate assets is core as contemplated by 28 U.S.C.

§ 157(b)(2). The finding turns solely on the fact that the insurance contract in question was entered into after the debtor had filed its Chapter 11 petition. In so holding, the court below adopted the views of the First Circuit and expressly rejected those of the Fifth and Ninth Circuits.

The Second Circuit discarded Judge Stanton's reasoning by distinguishing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) on the ground that the controversy in *Marathon* arose from a pre-petition contract and claim. The court below did not present any rationale based on *Marathon* that would justify the application of the purported distinction, that is, whether the underlying contract is entered into pre-petition or post-petition.

There can be little dispute as to the critical significance of the difference between core and non-core proceedings. Pursuant to Congress's Bankruptcy Amendments and Federal Judgeship Act of 1984 (the "BAFJA"), the statutory scheme that attempts to delineate the scope of the bankruptcy court's power to hear and resolve disputes, bankruptcy judges have plenary powers of adjudication over core proceedings. 28 U.S.C. §§ 157(b), 158(a). With respect to non-core matters, however, a bankruptcy judge's findings of fact and conclusions of law are subject to *de novo* review by the district court. 28 U.S.C. § 157(c)(1). The determination whether a matter is core or non-core may dictate in what forum, an article III court or an article I court, a particular dispute will be heard and resolved. Not only

does that determination have a substantial effect on a multitude of transactions in the public and private arenas, it also implicates issues of constitutional proportions with respect to the proper authority of the diverse courts in which controversies are adjudicated.

Decisional law in circuits other than the Second Circuit recognizes that the analysis of whether a proceeding is core ought not to turn arbitrarily on the distinction between a pre-petition and post-petition matter. *See* discussion, *infra,* of Fifth and Ninth Circuits' decisions. Indeed, the Court in *Marathon* established the dichotomy between the two essentially distinct types of claims related to and arising exclusively under bankruptcy proceedings, to wit, private

rights versus rights core to the federal bankruptcy power.

In the wake of the Court's decisions in *Marathon* and *Granfinanciera S.A. v. Nordberg*, ____ U.S. ____, 109 S. Ct. 2782 (1989), and Congress's enactment of the BAFJA, there is much confusion in the lower courts over the proper scope of the bankruptcy court's jurisdiction. Specifically, the lower courts have rendered conflicting decisions concerning what matters are non-core in light of 28 U.S.C. 157(b)(2) and its non-exhaustive list of enumerated core matters. Although section 157 provides a list of specific matters which are core, the courts have not been able to distinguish with consistency between unenumerated core matters and those matters which are non-core.

In *Marathon* the Court described the distinction between core and non-core matters:

> [T]he restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power, must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case.

*Marathon,* 458 U.S. at 72. Clearly, the distinction between core and non-core was derived from the specific underlying rights involved.

In response to the Court's pronouncement proscribing the authority of an article I bankruptcy judge to rule upon what are essentially state law claims, Congress amended the Federal Judgeship Act to draw a distinction between core and non-core matters. 28 U.S.C. § 157(b)(2). The very purpose of the BAFJA was to set, in light of

*Marathon*, the appropriate limits of the bankruptcy court's authority to hear and resolve disputes. Congress described core matters as those matters which directly relate to the restructuring of the debtor-creditor relationship. What Congress failed to do was give any clear indication of what would constitute "non-core" matters. A careful reading of *Marathon*, however, mandates that a distinction be made between the "adjudication of state-created private rights" and matters at the "core of the federal bankruptcy power." The proper conclusion to be drawn is that adjudication of ordinary state-law contract claims involves private rights between individuals and is not, as a matter of course, core to bankruptcy proceedings.

In *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568

(1985), the Court considered Congress's ability to vest decision-making authority in the Environmental Protection Agency, an administrative agency created pursuant to article I. The Court relied upon its decision in *Marathon* and pointed to the public rights/private rights dichotomy, emphasizing the distinction between claims arising from statutorily created rights and those claims between individuals arising under state law. The Court's decision in *Thomas* reiterates the proposition that disputes between individuals that arise wholly independently of any congressionally created statutes must be subject to an article III court's adjudication; plenary power to review such matters cannot be delegated to an article I court.

Certainly the spirit of the *Marathon* decision was not that a pre-petition/

post-petition bright line would suffice as the demarcation between core and non-core matters. Yet, the Second Circuit below appears to have adopted just such a test; it used the date of the debtor's bankruptcy petition filing as the line of demarcation. According to the Second Circuit, contracts entered into post-petition are core.

The decision below, therefore, ignores the Court's statement in *Marathon,* as well as section 157(b)(2), concerning the important distinction to be made between core and non-core proceedings. The Second Circuit did not consider the nature of the underlying dispute -- ordinary state law contract claims -- and concluded that any individual who enters into a contract with a debtor-in-possession automatically submits to the jurisdiction of the

bankruptcy court to adjudicate all disputes. Yet, the Second Circuit would have the very same parties who entered into an identical contract *prior* to the debtor's bankruptcy filing resolve any disputes arising from that contract in the article III courts as ordinary state law contract claims.

The impetus for the Second Circuit's pre-petition/post-petition distinction was a First Circuit case, *Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165 (1st Cir. 1987). In that matter, the First Circuit recognized that post-petition claims are traditionally core matters. The dispute was over the liquidation of bankruptcy estate assets, an enumerated core matter. The Second Circuit's ruling in the case at bar, however, did not focus

on the significance of that element in *Arnold Print Works*; under § 157(b)(2)(O), matters involving liquidation of bankruptcy estate assets are core. Clearly the case at bar does not involve any enumerated core matter under section 157(b)(2). Moreover, it is the First Circuit's *dicta* in *Arnold Print Works* that form the basis of the Second Circuit ruling that the subject insurance dispute is core. The logical extension of the ruling is an all-inclusive core category -- encompassing virtually all post-petition contracts -- which effectively nullifies Congress's attempt to resolve the problems highlighted by *Marathon*.

The Ninth Circuit has adopted a divergent view of the proper scope of the bankruptcy court's authority. In *Piombo Corp. v. Castlerock Properties, Inc. (In*

*re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986), the court interpreted section 157 narrowly. Citing *Marathon* and *Thomas* the court held that:

> state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)-(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, Sections § [sic] 157(b)(2)(A) and (O).

*Castlerock Properties*, 781 F.2d at 162.

The Court of Appeals for the Fifth Circuit is in accord with the Ninth Circuit's approach in *Castlerock Properties*, as well as the views expressed by the bankruptcy court in *Acolyte Electric Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987) (Hon. Jack B. Weinstein), *see* discussion, *infra*. In *Wood v. Wood (In*

*re Wood)*, 825 F.2d 90 (5th Cir. 1987), the Fifth Circuit defined the test for determining what are core matters as follows:

> We hold, therefore, that a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case. . . . [The controversy here] is simply a state contract action that, had there been no bankruptcy, could have proceeded in state court.

*Id.*, 825 F.2d at 97.

The court of appeals in *Wood* concluded that an action brought against a debtor and a third party for wrongful appropriation of corporate assets that occurred prior to the Chapter 11 bankruptcy filing was not core. In its analysis of the Court's intentions in *Marathon* and the meaning of section 157(b)(2) as applied to the cause of

action at issue in *Wood*, the Fifth Circuit examined the question as follows:

> If the proceeding does not invoke a substantive right created by the Federal Bankruptcy Law and is one that could exist outside of bankruptcy it is not a core proceeding; it may be *related* to the bankruptcy because of its potential effect, but under Section 157(c)(1) it is an "otherwise related" or non-core proceeding.

*Id.* (emphasis in original).

The Fifth Circuit follows a test that is true to the Court's holding in *Marathon*. It is the nature of the dispute and not its effect on the reorganization that should be determinative. *Wood*, 825 F.2d at 97. This test has also been applied by the United States Bankruptcy Court for the Eastern District of New York in *Acolyte Electric*, 69 Bankr. at 175. The Second Circuit, however, did not accept the reasoning of the Honorable Marvin

Holland, U.S.B.J., in the comprehensive opinion in *Acolyte*. Judge Holland determined that the adversary proceeding in that case was not a core proceeding because "resolution of th[e] action involve[d] a state law determination of the defendant's liability under the contract . . ." *Id.* at 172. Since the claim had an existence "independent of the bankruptcy environment" it could not be placed among the "core" proceeding categories enumerated under 28 U.S.C. § 157(b)(2). *Id.* at 173.

The Third Circuit also considered the question of what is core and what is non-core under section 157(b)(2). In *Southeastern Sprinkler Co., Inc. v. Meyertech Corp. (In re Meyertech Corp.)*, 831 F.2d 410 (3d Cir. 1987), a creditor of the bankruptcy estate filed a proof of claim for money owed on a pre-petition

contract. In its analysis the court noted:

> It is difficult to perceive of a proceeding which would not fall under the all-encompassing language of either § 157(b)(2)(A) or 157(b)(2)(O), [footnote omitted], but we are cautioned that an expansive interpretation of these provisions may lead to some seemingly incorrect and overbroad results regarding core proceedings.

*Meyertech,* 831 F.2d at 416 (citation omitted). The court also observed that no clear consensus existed among the decisions from the Pennsylvania bankruptcy courts that had wrestled with core/non-core distinction. *Id. at* 417. Ultimately, the Third Circuit decided that the voluntary act of filing a proof of claim itself subjected the creditor to the full jurisdiction of the bankruptcy court; it was a core matter. Indeed the Court's recent *per curiam* decision in *Langenkamp v. Culp,* ____ *U.S.* ____, 111

S. Ct. 330 (1990) *reh'g denied,* 111 S. Ct. 721 (1990), made quite clear the proposition, set forth some time ago in *Katchen v. Landy,* 382 U.S. 323 (1966), that by filing a proof of claim one is deemed to consent to the bankruptcy court's "equitable power." Accordingly, "there is no Seventh Amendment right to a jury trial." 111 S. Ct. at 331. Petitioners have not filed proofs of claim in this matter.

In *Marathon,* Justice White's dissent noted that "the great bulk of creditor claims are claims that have accrued under state law prior to bankruptcy," that is, pre-petition. *Marathon,* 458 U.S. at 96. Since such claims are core, the Second Circuit's conclusion that disputes arising from post-petition contracts are necessarily core, virtually eliminates the non-core category.

Chapter 11 reorganization exists to protect the debtor from its creditors and to rehabilitate by, among other things, encouraging others to do business with the debtor undergoing reorganization. It is therefore consistent with the statutory scheme of section 157 that pre-petition matters be subject to adjudication in the bankruptcy court as core proceedings. Similarly, the purpose of the statute is furthered if various post-petition controversies be adjudicated in article III courts as non-core matters. Third parties will transact business with debtors in rehabilitation more freely if they do not face the prospect that ensuing disputes will be heard and resolved in the article I bankruptcy courts. Trial before an article III judge is a valuable right which should not be compromised.

It is evident that there is anything but agreement among the circuits as to the proper interpretation of the BAFJA on the question of whether a dispute is core or non-core under 28 U.S.C. §§ 157(b) and 158(a). The divergent rulings are the direct result of the statutory ambiguity in the provisions which are intended to delineate the scope of the bankruptcy court's power to hear and resolve disputes. Confusion among the circuits runs counter to the purpose of uniform federal bankruptcy laws.

## II. THE SECOND CIRCUIT'S REMAND OF THIS CASE FOR A JURY TRIAL IN THE BANKRUPTCY COURT VIOLATES ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Granfinanciera v. Nordberg*, ____ *U.S.* ____, 109 S. Ct. 2782 (1989), the Court found that fraudulent transfer claims were triable to a jury.

Accordingly, the Court held that the bench trial which had been conducted in the bankruptcy court deprived petitioner of its seventh amendment right. The Court declined, however, to resolve a closely related question that had been highlighted by the findings in *Marathon* and the consequent BAFJA.

> We do not decide today whether the current jury trial provision -- 28 U.S.C. § 1411 (1982 ed., Supp. IV) -- permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the 1984 Amendments. We leave those issues for future decisions.

*Granfinanciera*, _____ U.S. at _____, 109 S. Ct. at 2802 (footnote omitted). While the facts presented in *Granfinanciera* did

not necessitate resolution of all the significant constitutional issues, that is not the case here. The Second Circuit's decision in this case invites a pronouncement from the Court as to whether a bankruptcy court is empowered to conduct a jury trial.

Notwithstanding that *Granfinanciera* involved an alleged fraudulent conveyance, an enumerated core matter, the right to a jury trial was preserved:

> Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

*Granfinanciera*, ____ U.S. at ____, 109 S. Ct. at 2800.

The Second Circuit placed significant reliance on *Granfinanciera* in reaching its conclusion that the Petitioners are entitled to a jury trial in

the case at bar. The court then turned to the issue of whether that jury trial could be conducted in the bankruptcy court without running afoul of the BAFJA or the Constitution. The lack of guidance in the language of 28 U.S.C. § 1411 was expressly noted, as was the absence of any procedural provision in the Bankruptcy Rules. Nonetheless, the court concluded that because the matter was core, constitutional proscriptions with respect to *de novo* review did not bar tne conduct of a jury trial in the bankruptcy court. Although the court below acknowledged that jury trials in core matters in the bankruptcy court might well be at odds with the seventh amendment, it reasoned that the district court's power to review final orders of the bankruptcy court in core proceedings was analogous to the circuit court's

power to review district court orders. Thus, according to the Second Circuit, constitutional considerations were satisfied.

Following *Granfinanciera,* the courts have struggled to reconcile the prescribed jurisdiction and authority of the bankruptcy courts with the seventh amendment right to trial by jury. For example, in *Perino v. Cohen (In re Cohen),* 107 Bankr. 453 (S.D.N.Y. 1989), the Honorable Charles L. Brieant, U.S.D.J., held that, for judicial efficiency, the bankruptcy court "should" conduct the jury trial of a claim that was legal in nature. *Id.* at 455. Judge Brieant did comment on the constitutional ramifications of a bankruptcy court's conducting a jury trial:

> The Seventh Amendment provisions, and cases decided thereunder, limiting the power of any federal court to modify

> or disregard a jury verdict, because the Constitution is paramount, will take precedence over any statutory provisions for *de novo* review of factual findings of the Bankruptcy Court.

*Id.* at 455.

Since the original opinion and judgment of the Second Circuit in the case at bar, two other circuits have had occasion to consider the question whether the conduct of a jury trial in a bankruptcy court would infringe on seventh amendment rights. In both instances, the courts of appeals disagreed with the reasoning and the decision of the Second Circuit. *See In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990) and *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990).

In circuits where the courts of appeal have not yet had the occasion to

speak, the lower courts' opinions have reflected the pervasive uncertainty on the issue at hand. In *Haden v. Edwards (In re Edwards)*, 104 Bankr. 890 (Bankr. E.D. Tenn. 1989), the court concluded that a bankruptcy court could not conduct a jury trial, expressing the view that after *Granfinanciera*, whether a matter was core was not relevant on the jury issue.

> The controlling issue, for jury trial purposes, now appears to be whether the proceeding is one which sounded in law or in equity at common law.

*Edwards*, 104 Bankr. at 893, n. 4. Citing the pronouncement in *Carr v. Michigan Real Estate Ins. Trust (In re Michigan Real Estate Ins. Trust)*, 87 Bankr. 447, 460 (Bankr. E.D. Mich. 1988), "that when a party properly requests a jury trial in a non-core proceeding, an insoluble jurisdictional mess occurs in the

bankruptcy court," the *Edwards* court commented that the statement in *Carr* "can now be broadened to include a core proceeding." *Edwards* at 898, n. 10.

In *Friedman v. Gold Advice, Inc. (In re Fort Lauderdale Hotel)*, 103 Bankr. 335 (Bankr. S.D. Fla. 1989), another court was faced with the issue. Citing *Granfinanciera* for its view that the defendant had a right to a jury trial, the court noted that Bankruptcy Rule 9015 which establishes bankruptcy court procedures for jury trials had been repealed. The court went on to cite a Florida district court opinion, *In re I.A. Durbin, Inc.*, 62 Bankr. 139 (S.D. Fla. 1986), as authority for the conclusion that the bankruptcy court did not have power to conduct jury trials.

The cases throughout the nation demonstrate that the courts are in a

quandary when faced with a valid jury demand in the bankruptcy court.[3]

The reported opinions on the issue have been generated in the context of both core and non-core proceedings. Notwithstanding the painstaking analysis that is evident from much of the decisional law that has developed, there is clearly no consensus as to the limits of the bankruptcy court's jurisdiction and power with respect to the conduct of jury trials. Indeed, considerable doubt has been expressed as to the ability of a bankruptcy court to conduct a jury trial.

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[3] *Jackson v. Wessel (In re Jackson)*, 90 Bankr. 126, 135 (Bankr. E.D. Pa. 1988) ("We do have some reservations as to our conclusion that, even in this matter, involving a core proceeding which presents an action at law, we, as a bankruptcy court, may conduct a jury trial.") *See also Leird Church Furniture Mfg. Co. v. Union National Bank of Little Rock (In re Leird Church Furniture Mfg. Co.)*, 61 Bankr. 444, 446 (Bankr. E.D. Ark. 1986); *Wm. S. Newman Brewing Co., Inc. v. Schmidt and Sons, Inc. (In re Wm. S. Newman Brewing Co., Inc.)*, 87 Bankr. 236, 239 n.2 (Bankr. N.D. N.Y. 1988); *Baitinger Electric Co., Inc. v. Daidone Electric of New York, Inc. (In re Baitinger Electric Co.)*, 94 Bankr. 33 (S.D.N.Y. 1988).

These issues are directly presented in the case at bar. Their resolution by the Court would answer critical questions which remain after *Granfinanciera*.

## III. THE COURT'S EXERCISE OF JURISDICTION IN THIS CASE IS JUSTIFIED BY THE FAR-REACHING IMPLICATIONS UNDER ARTICLE III AND THE SEVENTH AMENDMENT OF THE CONSTITUTION

In *Marathon*, the Court held that Congress's broad grant of jurisdiction to bankruptcy judges under 28 U.S.C. § 1471 was in violation of article III of the Constitution. Under article I, section 8 of the Constitution, bankruptcy courts could be empowered by Congress to issue final orders in core proceedings. The legislation which was developed in response to *Marathon* attempted, specifically in section 157, to delineate with greater particularity what matters

were at the "core" of the bankruptcy court's jurisdiction.

While the concept underlying the distinction between core and non-core matters is evident, section 157 does not provide any guidance as to what types of matters fall into the non-core category (*see* discussion, Point I). Moreover, what remained unresolved after *Marathon*, and was not addressed in subsequent legislation, was the way in which one would exercise the right to a jury trial in a bankruptcy court proceeding.

In *Granfinanciera*, the Court focused on several related issues but did not reach the question of whether jury trials conducted by bankruptcy judges in the bankruptcy court -- in core or non-core matters -- would infringe on the seventh amendment right or the guarantees under article III. Any law or ruling which

threatens to erode the seventh amendment right to a jury trial is subject to a high level of scrutiny. *Dimick v. Schiedt,* 293 U.S. 474 (1935). Thus it is essential that the Court rule upon the constitutionality of the Second Circuit's order that this case be tried by jury in an article I court.

Where the circuit courts have rendered conflicting decisions on issues of considerable moment, especially on matters that should be treated consistently throughout the United States, certiorari should be granted. *See McElroy v. United States,* 455 U.S. 642, 643 (1982); *Marks v. United States,* 430 U.S. 188 (1977); *City of New York v. Saper,* 336 U.S. 328, 329 (1949) (inconsistent application and administration of Bankruptcy Act warranted grant of certiorari). In this con-

troversy, there can be little doubt as to the constitutional significance of the question which presented. Indeed, in *Granfinanciera,* the Court noted the need to address the jury trial issue. The recent pronouncements by the Eighth and Eleventh Circuits further underscore the uncertainty that exists on the question of whether bankruptcy judges can conduct jury trials.

On June 28, 1990, this Court granted certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit, initially entered on February 7, 1990. The matter was briefed and scheduled for argument on December 3, 1990, but was then remanded to the court of appeals to address the jurisdiction issue raised by the intervenor. That same court of appeals opinion and judgment are now presented to

the Court, having been reinstated by the Second Circuit after it confirmed its jurisdiction. No decisions rendered since the original grant of certiorari have had any impact on the considerations which warranted review of the subject opinion and judgment. The only developments in this area of the law have continued to highlight the divergent views among the circuits, the Second Circuit now constituting a minority of one among the three circuits that have addressed the issue.

Since the Court originally granted certiorari, some courts have held certain bankruptcy proceedings in abeyance pending the Court's decision. *See, e.g., In re Federated Dep't Stores, Inc. and Allied Stores Corp., et al,* WL Camp 2070 (Bankr. S.D. Ohio Oct. 26, 1990) ("Furthermore, the issue of whether any

of the issues before the Court merit a jury trial will likely be resolved by the Supreme Court during its present term.") Thus questions which were compelling when this Court granted certiorari in the first instance are equally, if not more compelling now.

## CONCLUSION

The Court's pronouncements in *Marathon*, Congress's response, and the Court's holding in *Granfinanciera* have raised issues integral to the proper functioning of the bankruptcy system. The case at bar presents the Court with the opportunity to resolve these significant issues. For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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ebruary 12, 1991

# APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 486—August Term 1989

(Submitted January 2, 1991 Decided January 22, 1991)

Docket No. 89-5026

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP,

*Debtors,*

BEN COOPER, INC.,

*Appellant,*

—v.—

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

*Appellees.*

Before:

TIMBERS, CARDAMONE and PRATT,

*Circuit Judges.*

On remand from the Supreme Court, which entered a judgment, 111 S. Ct. 425 (1990), vacating our previous judgment, 896 F.2d 1394 (1990), and directing us to address the question of appellate jurisdiction.

We hold that we do have jurisdiction. Our previous opinion and judgment are reinstated.

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KENNETH W. STARR, Solicitor General, Stuart M. Gerson, Assistant Attorney General, John G. Roberts, Jr., Deputy Solicitor General, Stephen J. Marzen, Assistant to the Solicitor General, William Kanter, Katherine S. Gruenheck and Robert M. Loeb, Attorneys, Department of Justice, Washington, D.C., *filed a brief on behalf of intervenor United States.*

LAWRENCE L. GINSBURG, Charles S. Biener, and Lowenthal, Landau, Fischer & Ziegler, New York, N.Y., *filed a brief on behalf of appellant.*

STUART COTTON, Karen M. Cooke, and Mound, Cotton & Wollan, New York, N.Y., *filed a brief on behalf of appellees.*

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PER CURIAM:

On November 13, 1990, the Supreme Court entered a judgment, 111 S. Ct. 425 (1990), vacating our opinion

and judgment entered February 7, 1990, reported at 896 F.2d 1394, on the ground that "the Court of Appeals should address the jurisdictional issue in the first instance . . . ." 111 S. Ct. at 425.

By an order dated November 27, 1990, we directed the parties to file briefs addressed to the jurisdictional issue. The parties filed briefs, as did the Solicitor General on behalf of the United States which had been granted the status of intervenor by the Supreme Court.

All parties to these proceedings, as well as the Solicitor General, ultimately agree that we had jurisdiction to review the district court judgment that was the subject of the instant appeal. We conclude in the exercise of our independent judgment that we had jurisdiction. While the parties and the Solicitor General reach this result by different analyses, we agree with the analysis of the Solicitor General.

## I.

We shall summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on this remand from the Supreme Court.

In April 1988, appellant Ben Cooper, Inc. (Cooper), a manufacturer, filed a voluntary petition for reorganization pursuant to Chapter 11. The reorganization plan entered into required it to obtain insurance for its facilities. Cooper obtained insurance from appellee Insurance Company of the State of Pennsylvania (ICSP) through brokers, appellees Kalvin-Miller International, Inc. (K-M) and Kerwick & Curran, Inc. (K&C). After a fire loss in January 1989, Cooper filed a claim with ICSP. In April 1989, ICSP commenced an action in the state

court, seeking, *inter alia*, to void the insurance policy because of alleged misrepresentations made by Cooper in its policy application.

On May 9, 1989, Cooper obtained from the bankruptcy court (Blackshear, J.) a stay of the state court action and a preliminary injunction requiring ICSP to maintain the policy. Cooper also commenced an adversary proceeding in the bankruptcy court. It sought, *inter alia*, a declaration that ICSP was liable for all losses sustained in the fire. Appellees opposed the bankruptcy court's jurisdiction over the adversary proceeding and moved in the district court for withdrawal of the reference. They also moved to have the state court stay and the preliminary injunction lifted. The district court (Walker, J.) remanded the case to the bankruptcy court for a determination whether the claims in the proceeding were "core" or "non-core."

On June 15, 1989, the bankruptcy court entered an order holding that the proceeding was core and retaining jurisdiction. The district court (Stanton, J.) reversed. By oral decision dated July 11, 1989, the district court held that the adversary proceeding was non-core and that appellees were entitled to a jury trial on at least some of the issues raised; it also withdrew the reference to the bankruptcy court, abstained from exercising its own jurisdiction and lifted the stay of the state court proceedings.

On appeal to our Court, the issues were defined as whether the adversary proceeding was core and whether appellees are entitled to a jury trial. 896 F.2d at 1397. We reversed the district court, holding, *inter alia*, that the proceeding was core.

ICSP and K&C petitioned the Supreme Court for certiorari, which was granted on June 28, 1990. Briefs on the merits were filed by the parties and by the Solicitor General on behalf of the United States. In its brief, the Solicitor General addressed the question of our jurisdiction and concluded that the "judgment of the court of appeals should be affirmed." On November 13, 1990, the Supreme Court remanded the case to us for consideration of the jurisdictional question.

II.

We turn now to the question of our jurisdiction. We agree with the Solicitor General that, had the district court gone no further than to withdraw the reference to the bankruptcy court, that decision would have been interlocutory and not appealable pursuant to either 28 U.S.C. § 158(d) (1988) (providing for appeals of final decisions of district courts that dispose of bankruptcy appeals) or 28 U.S.C. § 1291 (1988) (providing for appeals of final decisions of district courts). *E.g.*, *In re Chateaugay Corp.*, 826 F.2d 1177, 1179 (2 Cir. 1987) (holding that an order granting or denying withdrawal is not an appealable order).

We agree further with the Solicitor General that the interlocutory withdrawal order here merged into the final judgment and thus became reviewable. The district court ultimately abstained from exercising jurisdiction. Since we have found previously and reinstate today our finding that the the adversary proceeding was "core," it follows necessarily that the proceeding was not a candidate for "mandatory abstention" pursuant to 28 U.S.C. § 1334(c)(2), which provides that a district court "shall abstain" from exercising jurisdiction in a case "related

to a case under title 11 but not arising under title 11 or arising in a case under title 11." Section 1334(c)(2) further provides that any abstention decision made under that subsection is "not reviewable by appeal or otherwise." The district court's abstention, however, could only have been pursuant to § 1334(c)(1), which provides that a court *may* abstain "from hearing a particular proceeding arising under Title 11 or arising in or related to a case under Title 11." In view of our finding that the adversary proceeding is "core", § 1334(c)(1) abstention ("permissive abstention") was all that could have been exercised by the district court. Nothing prevents appellate review of such an abstention decision.

III.

Having found that we had jurisdiction to review the district court's judgment, we now reinstate our previous opinion and judgment, 896 F.2d 1394, reversing the district court's judgment.

IV.

To summarize:

We had jurisdiction to hear an appeal from a district court judgment that, *inter alia*, withdrew a reference from a bankruptcy court and at the same time abstained from exercising jurisdiction in a core proceeding. Our previous opinion and judgment, 896 F.2d 1394, are reinstated. Appellant and appellees shall bear their own costs.

**UNITED STATES COURT OF APPEALS**

**FOR THE**

**SECOND CIRCUIT**

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At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 27th day of November, one thousand nine hundred and ninety.

Present:

HONORABLE WILLIAM H. TIMBERS,

HONORABLE RICHARD J. CARDAMONE,

HONORABLE GEORGE C. PRATT,

Circuit Judges,

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IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP.,

Debtors,

---

BEN COOPER, INC.,

Appellant,

v.

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

Appellees.

---

**ORDER ON REMAND FROM SUPREME COURT**

This Court on February 7, 1990 entered a judgment and filed an opinion, 896 F.2d 1394, reversing the judgment of the District Court and remanding the case to the District Court for further proceedings.

The Supreme Court on June 28, 1990 granted the petition for certiorari filed by The Insurance Company of the State of Pennsylvania, et al., 110 S.Ct. 3269.

The Solicitor General on September 28, 1990 filed in the Supreme Court a "Motion on Behalf of the United States for Leave to Intervene and Brief for the United States" (SG Br.).

The SG Br. at 50 concludes as follows:

> "The judgment of the court of appeals should be affirmed."

The Supreme Court on November 13, 1990 (59 U.S.L.W. 3362) entered a judgment (attached hereto as Exhibit A) which granted the Solicitor General's motion to intervene, vacated the judgment of our

Court, and remanded the cause to our Court for consideration of the jurisdictional issue raised by the United States. SG Br. at 9-17. (attached hereto as Exhibit B).

Accordingly, it is ORDERED as follows:

(1) The judgment of the Supreme Court dated November 13, 1990 is made the judgment of our Court.

(2) Counsel for the respective parties are requested to file, not later than 30 days from the date of this order, briefs addressed to the jurisdictional issue raised in SG Br. at 9-17.

(3) Copies of this order and the attached exhibits shall be furnished to counsel who argued this case in our Court on December 21, 1989 together with the Solicitor General and the Clerk of the Supreme Court.

Dated at New York, N.Y.
This 27 day of November, 1990

ELAINE B. GOLDSMITH, CLERK
/s/

cc: Charles S. Biener, Esq.
Costantino P. Suriano, Esq.
Victoria A. Stewart, Esq.
Geoffrey W. Heineman, Esq.
Kenneth W. Starr, Solicitor General
Joseph P. Spaniol, Jr., Esq., Clerk,
United States Supreme Court

**SUPREME COURT OF THE UNITED STATES**

No. 89-1784

Insurance Company of the State of Pennsylvania, et al.,

Petitioners,

v.

Ben Cooper, Inc.

**ON WRIT OF CERTIORARI** to the United States Court of Appeals for the Second Circuit.

**THIS CAUSE** having been submitted on the briefs of the parties, the joint appendix, the record from the lower court, and the motion to intervene filed by the United States,

**ON CONSIDERATION WHEREOF:** The motion of the United States filed in this Court on September 28, 1990 and granted by this Court has raised a question concerning the Court of Appeals' jurisdiction over this case and hence a question about our own jurisdiction. Motion of the United

States and Brief of the United States, pages 9 through 17. Because the Court of Appeals should address the jurisdictional issue in the first instance, the judgment of the above court is vacated with partial costs, and the cause is remanded to the United States of Appeals for the Second Circuit for consideration of the jurisdictional issued raised by the United States.

**IT IS FURTHER ORDERED** at the direction of the Court that the petitioners, Insurance Company of the State of Pennsylvania, et al., recover from Ben Cooper, Inc., one-half of the total costs, Ten Thousand Eight Hundred Twenty-Four Dollars ($10,824.00), for their costs herein expended.

November 13, 1990

| | |
|---|---|
| Clerk Costs: | $ 300.00 |
| Printing of record: | 21,348.00 |
| Total: | $21,648.00 |

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 486—August Term 1989

(Argued December 21, 1989

Decided February 7, 1990)

Docket No. 89-5026

IN RE: BEN COOPER, INC., LIGHT MANUFACTURING CO., INC., AIMWELL PRODUCTS, INC., BEN COOPER SALES CORP,

*Debtors*,

BEN COOPER, INC.,

*Appellant*,

—v.—

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,

*Appellees*.

Before:

TIMBERS, CARDAMONE and PRATT,

*Circuit Judges*.

Appeal from an order entered July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*, withdrawing the reference to the bankruptcy court, abstaining from exercising jurisdiction and lifting a stay of proceedings in the New York Supreme Court, New York County.

Reversed and remanded.

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CHARLES S. BIENER, New York, N.Y., (Lowenthal, Landau, Fischer & Ziegler, P.C., New York, N.Y., on the brief) *for appellant Ben Cooper, Inc.*

CONSTANTINO P. SURIANO, New York, N.Y., (Stuart Cotton, Karen M. Cooke, and Mound, Cotton & Wollan, New York, N.Y., on the brief) *for appellee Insurance Company of the State of Pennsylvania.*

VICTORIA A. STEWART, New York, N.Y., (Jackson & Nash, New York, N.Y., on the brief) *for appellee Kalvin-Miller International, Inc.*

GEOFFREY W. HEINEMAN, New York, N.Y., (Ohrenstein & Brown, New York, N.Y., on the brief) *for appellee Kerwick & Curran, Inc.*

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TIMBERS, *Circuit Judge*:

Appellant Ben Cooper, Inc. ("Cooper") appeals from an oral decision from the bench on July 11, 1989, in the Southern District of New York, Louis L. Stanton, *District Judge*. The district court reversed an order of the bankruptcy court, Cornelius Blackshear, *Bankruptcy Judge*, filed on June 15, 1989. The bankruptcy court held that the adversary proceeding filed by Cooper against appellees Insurance Company of the State of Pennsylvania ("ICSP"), Kalvin-Miller International, Inc. ("KM") and Kerwick & Curran, Inc. ("K & C") was "core" within the meaning of 28 U.S.C. § 157(b)(2) (1988). It retained jurisdiction. The district court disagreed, holding that the adversary proceeding was merely "related" to Cooper's underlying Chapter 11 petition, and withdrew the reference to the bankruptcy court. The district court also held that withdrawal was required because appellees were entitled to a jury trial on at least some of their affirmative defenses and on some of Cooper's claims. The district court then abstained from addressing the merits of Cooper's claims in favor of ongoing proceedings based on the same operative facts, commenced by ICSP in New York Supreme Court, New York County. Cooper timely appealed to this Court.

On appeal, Cooper asserts that the proceeding is core and that appellees are not entitled to a jury trial. Appellees, in turn, assert that the proceeding is non-core and that their jury demand should be honored. For the reasons stated below, we hold that the proceeding is core, and therefore we reverse the district court. We also hold that appellees are entitled to a jury trial, and that such

trial should be in the bankruptcy court. We therefore remand the case to the bankruptcy court.

We reach our determination of the issue of core jurisdiction in light of *In re Manville Forest Products Corp.*, No. 89-5019, ____ F. 2d ____ (2 Cir. 1990), also decided today, and assume familiarity with that opinion.

I.

We summarize only those facts and prior proceedings believed necessary to an understanding of the issues raised on appeal.

Cooper is a toy and costume manufacturer and importer. Facing economic difficulties, it filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in April 1988. Pursuant to that petition, Cooper submitted a reorganization plan under which, among other things, it covenanted to "keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards."

Acting to fulfill its responsibility under the plan (which was finally confirmed by the bankruptcy court on April 4, 1989), Cooper retained KM, an insurance broker, to obtain coverage for its various facilities. KM enlisted K & C, another broker, to assist in finding coverage for Cooper. In October 1988 the brokers procured from ICSP a standard commercial property insurance policy for one of Cooper's facilities, located in Georgia. Appellees do not dispute that they were aware of Cooper's Chapter 11 status.

On January 6, 1989, the Georgia facility was hit by fire, resulting in damage that, Cooper claimed, totaled

over $2 million. After an extended investigation, ICSP determined that it was not liable for the loss because of alleged misrepresentations and omissions by Cooper in the policy application; specifically, that Cooper failed to disclose in its application that the facility was used for manufacturing rather than as a warehouse. Moreover, ICSP determined that Cooper exaggerated its loss in the fire when it submitted its claim. That dispute underlies the instant appeal but is not before us directly. We express no view as to its proper disposition.

On April 18, 1989, ICSP formally cancelled its policy with Cooper. That same day, ICSP commenced an action in the New York Supreme Court, New York County. Its complaint alleged three causes of action: (1) that the policy was void *ab initio* due to the misrepresentations in Cooper's application; (2) that it was not liable for the fire loss because of those misrepresentations; and (3) that it was not liable under the policy because of Cooper's exaggerated claim of loss. Cooper sought and, on May 9, received from the bankruptcy court a stay of the state court action and a preliminary injunction requiring ICSP to maintain the policy.

Almost simultaneously, Cooper commenced, in the bankruptcy court, the adversary proceeding that is the subject of the instant appeal. Cooper's complaint contained three counts. The first, against ICSP, requested a declaration that the policy remained in effect, a declaration that ICSP was liable for all losses sustained in the fire, and punitive damages from ICSP of $5 million. The second count, against KM, alleged negligent conduct in obtaining the policy, and requested, if ICSP were found not liable under the policy, that KM be held responsible for the fire and consequential losses. The

third count, against K & C, essentially mirrored the second. ICSP's answer set forth five affirmative defenses. Three of them repeated, almost to the word, the three causes of action in ICSP's state court complaint.

Appellees opposed the bankruptcy court's jurisdiction over the adversary proceeding, and moved the district court for withdrawal of the reference. They also moved to have the state court stay and the preliminary injunction lifted. Rather than rule on the merits of the motion, the district court, Hon. John M. Walker, remanded the case to the bankruptcy court on May 31 for a determination of the question whether the claims in the proceeding were core.

On June 15 the bankruptcy court entered an order holding that the proceeding was core, and retained jurisdiction. It relied primarily on § 157(b)(2)(A) (estate administration) and secondarily on § 157(b)(2)(L) (confirmation of plans).

Appellees then moved in the district court to reverse that order. The court did so in an oral ruling dated July 11, holding that, while the statutory provisions were relevant to the adversary proceeding, the statutory provisions were not sufficiently broad to render the proceeding core. Moreover, the court held that appellees were entitled to a jury trial on at least some of the issues raised. The court also granted the ancillary relief appellees sought: withdrawal of the reference to the bankruptcy court, abstaining from exercising its own jurisdiction, and lifting the stay of the state court proceedings. This appeal followed.

On appeal, the parties agree that the primary issues are (1) whether the adversary proceeding is core, and

(2) whether appellees are entitled to a jury trial, as they have demanded. Cooper does not raise the other issues on which the district court ruled—the decisions to lift the state court stay and to abstain from exercising jurisdiction.

II.

We turn first to the question whether the adversary proceeding is core within the meaning of 28 U.S.C. § 157(b)(2) (1988). As a question of law, we review de novo the district court's determination that the proceeding is non-core. *Brunner* v. *New York State Higher Ed. Servs.*, 831 F.2d 395, 396 (2 Cir. 1987).

(A)

The jurisdiction of the bankruptcy court over core proceedings is set forth in 28 U.S.C. § 157(b)(1) (1988), which provides that "[b]ankruptcy judges may hear and determine . . . all core proceedings arising under title 11 . . . and may enter appropriate orders and judgments." By contrast, any determinations by the bankruptcy court in a non-core proceeding, upon timely objection, are subject to de novo review by the district court. 28 U.S.C. § 157(c)(1) (1988).

In § 157(b)(2), Congress provided a non-exclusive list of proceedings which it deemed core. Like the bankruptcy court, our analysis will focus on § 157(b)(2)(A) ("matters concerning the administration of the estate"). The language of that sub-section could be construed to include almost any matter relating to bankruptcy, but the structure of the statute as a whole does not permit such a construction. Matters that merely concern the

administration of the bankrupt estate tangentially are related, non-core proceedings. *In re Wood*, 825 F.2d 90, 96 (5 Cir. 1987) (Wisdom, J.).

Our attempt to make the general language of § 157(b)(2)(A) more concrete begins with the Supreme Court's plurality opinion in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). At issue in *Marathon* was the provision of the Bankruptcy Act of 1978 which gave the bankruptcy court "jurisdiction over all 'civil proceedings arising under . . . or arising in or *related to* cases under title 11.' " *Id.* at 54 (emphasis in original) (quoting 28 U.S.C. § 1471(b) (Supp. IV 1980)). In order to exercise that jurisdiction, the statute vested bankruptcy courts with "all of the 'powers of a court of equity, law, and admiralty,' " with only very limited exceptions. *Id.* at 55 (quoting 28 U.S.C. § 1481 (Supp. IV 1980)). Despite that broad jurisdictional grant, however, the Act did not give bankruptcy judges Article III status.

In *Marathon*, the underlying cause of action, as here, was breach of contract. The cause of action arose before Northern Pipeline, the debtor, petitioned the bankruptcy court for Chapter 11 reorganization. The debtor, however, did not initiate the action until after the Chapter 11 petition was filed. Under the 1978 Act, therefore, the bankruptcy court had full jurisdiction over the dispute.

The Supreme Court held that while Congress, pursuant to its power under the Bankruptcy Clause of the Constitution, U.S. Const., art. I, § 8, cl. 4, could grant the bankruptcy courts the right to issue final orders in proceedings that were at the core of bankruptcy jurisdiction, primarily the restructuring of the debtor-creditor relationship, it could not give the right to issue such

orders in "private right" claims (e.g., tort and contract), merely because those claims involved a debtor. *Marathon*, *supra*, 458 U.S. at 71. Those traditional common law claims, the Court held, were reserved for Article III courts.

The congressional response to *Marathon* is set forth in § 157. We employ the "traditional tools of statutory construction," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 (1987), to interpret that response. Neither the House nor the Senate issued a report regarding the Bankruptcy Amendments and Federal Judgeship Act of 1984, of which § 157 is a part. The statements of several influential legislators, however, indicate that bankruptcy jurisdiction was to be construed as broadly as possible within the constitutional constraints of *Marathon*. We agree with the First Circuit's analysis of the legislative history. As that court stated,

> "the legislative history of [§ 157] indicates that Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits. The sponsors repeatedly said that 95 percent of the proceedings brought before bankruptcy judges would be core proceedings. *See* 130 Cong. Rec. E1108-1110 (daily ed. March 20, 1984) (statement of Representative Kastenmeier); *id.* at H1848, H1850 (daily ed. March 21, 1984) (statement of Representative Kindness). They used arguments strongly suggesting that they were pressing the notion to its constitutional bounds. They referred to the suits in the non-core category as 'Marathon-type' cases, *see, e.g.*, *id.* at E1108, E1109 (daily ed. March 20, 1984) (prepared statement of Representative Kastenmeier); *id.* at H1848

> (daily ed. March 21, 1984) (statement of Representative Kindness), which they understood to be proceedings of 'a very limited kind,' *id.* at H1848 (daily ed. March 21, 1984) (statement of Representative Kindness)."

*In re Arnold Print Works, Inc.*, 815 F.2d 165, 168 (1 Cir. 1987) (Breyer, J.).

Moreover, § 157(b)(3) provides additional support for our conclusion that Congress intended a narrow reading of *Marathon*. That section provides in relevant part that "[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law." We read that as a demonstration of Congress' intent that bankruptcy courts are not precluded from adjudicating state-law claims when such claims are at the heart of the administration of the bankrupt estate.

(B)

With this in mind, our task is to determine whether this adversary proceeding, which arose after Cooper filed its Chapter 11 petition and which is founded on state contract law, falls within "the core of the federal bankruptcy power." *Marathon*, *supra*, 458 U.S. at 71.

Section 301 of the Bankruptcy Code provides:

> "A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter. The commencement of a voluntary case under a chapter of

> this title constitutes an order for relief under such chapter."

11 U.S.C. § 301 (1988). The filing of the petition sets in motion several events. Most significant, from the standpoint of the instant appeal, it creates the "estate" for bankruptcy purposes. 11 U.S.C. § 541(a) (1988). The Supreme Court has stated, in construing the direct predecessor to § 541(a), that

> " 'the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication is that which the bankrupt owned at the time of the filing of the petition.' "

*Goggin* v. *Division of Labor Law Enforcement*, 336 U.S. 118, 125-26 (1949) (quoting *Everett* v. *Judson*, 228 U.S. 474, 479 (1913)); *see also Kohn* v. *Myers*, 266 F.2d 353, 355 (2 Cir. 1959); *Lockhart* v. *Garden City Bank & Trust Co.*, 116 F.2d 658, 661 (2 Cir. 1940). Moreover, in addition to creating estate property, the filing date adjusts "the rights of others connected with the proceeding." King, 4 Collier on Bankruptcy ¶ 541.04, at 541-22 (15th ed. 1989). Logically, a post-petition contract that has as its subject matter an estate asset must be analyzed differently than one arising pre-petition.

The First Circuit, in *Arnold Print Works*, *supra*, recently held that post-petition contract claims are core. *Arnold Print Works* observed that, historically, trustees and debtors-in-possession (Cooper's status) have been viewed for various purposes as officers of the bankruptcy court. 815 F.2d at 169-70. Post-petition contracts

with the debtor-in-possession, therefore, are integral to the estate administration from the date they are entered into. *Id.*; *In re Baker & Getty Financial Servs. Inc.*, 88 B.R. 137, 139-40 (Bankr. N.D. Ohio 1988); *In re Franklin Computer Corp.*, 60 B.R. 795, 800-01 (Bankr. E.D. Pa. 1986). We find the reasoning of *Arnold Print Works* especially persuasive in light of the facts of the instant appeal: the Georgia facility was an asset of the estate; Cooper's reorganization plan promised adequate insurance for the estate assets; the bankruptcy court's confirmation of the plan was premised on adequate insurance; and appellees were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. *Cf. In re Mike Burns Inn, Inc.*, 70 B.R. 863 (Bankr. D. Mass. 1987) (post-petition claim on insurance policy acquired post-petition is core); *In re Heaven Sent, Ltd.*, 50 B.R. 636 (Bankr. E.D. Pa. 1985) (action to maintain insurance is core). It is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration.

We hold, therefore, that the bankruptcy court has core jurisdiction, pursuant to § 157(b)(2)(A), over contract claims under state law when the contract was entered into post-petition. The adjudication of such claims is an essential part of administering the estate. We read *Marathon* to apply to claims arising *pre-petition*, and decline to apply that ruling to claims involving contracts entered into post-petition. Similarly, we distinguish those lower court cases cited by appellees that, relying on *Marathon*, hold pre-petition claims to be non-core. *E.g.*, *In re Pied Piper Casuals, Inc.*, 65 B.R. 780 (S.D.N.Y. 1986); *In re Blue Point Carpet,*

*Inc.*, 86 B.R. 327 (Bankr. E.D.N.Y. 1988); *Acolyte Electric Corp.* v. *City of New York*, 69 B.R. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, No. 86-0329 (E.D.N.Y. 1987).

We are aware that language from opinions of two other circuits may be read to disagree with our holding. In one, *In re Castlerock Properties*, 781 F.2d 159 (9 Cir. 1986), the contract apparently existed pre-petition. It is therefore unlikely that its holding that the proceeding in question was non-core conflicts with our holding on the instant appeal. In any event, we decline to follow the sweeping statement in *Castlerock* that

> "state law contract claims that do not specifically fall within the categories of core proceedings enumerated in 28 U.S.C. § 157(b)(2)(B)(-)(N) are related proceedings under § 157(c) even if they arguably fit within the literal wording of the two catch-all provisions, sections § [sic] 157(b)(2)(A) and (O)."

*Id.* at 162. Such a reading of the statute in our view would render the general provisions null.

The Fifth Circuit stated in *In re Wood*, *supra*, 825 F.2d at 97, that "a proceeding is core under section 157 if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." The court held that a claim under state law arising from a post-petition dispute did not fit either category. The instant appeal does not fit in the first category. We hold that the timing of a dispute may render it uniquely a bankruptcy case. To the extent that *Wood* conflicts with our holding, we decline to follow it.

## III.

Having held that the bankruptcy court has jurisdiction over the adversary proceeding as a core matter, we turn to the question whether appellees are entitled to a jury trial on the factual issues raised, i.e., whether Cooper misrepresented the nature of the facility in its insurance application and whether it exaggerated its loss from the fire.

### (A)

In its decision, the district court stated that "[t]he defendants are entitled to a jury trial with respect to at least some of the debtor's claims and their affirmative defenses." That ruling made no reference to *Granfinanciera, S.A.* v. *Nordberg*, 109 S. Ct. 2782 (1989), decided only two weeks earlier. Since that case weighs heavily on the instant appeal, we address it in depth.

In *Granfinanciera*, the respondent, a Chapter 11 trustee, sued the petitioners in the bankruptcy court to recover fraudulent transfers allegedly made by the bankrupt corporation. Section 157(b)(2)(H) explicitly provides that actions to recover fraudulent conveyances are core proceedings. The bankruptcy court therefore held that it could hear the action without a jury, despite the petitioners' demand for a jury trial. The district court and the court of appeals both affirmed. The Supreme Court, however, in a somewhat opaque opinion, reversed.

One aspect of the Supreme Court opinion is clear—that is, when a party makes a jury demand for a claim that is inherently legal, "Congress cannot eliminate [that] party's Seventh Amendment right to a jury trial

merely by relabeling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity." *Id.* at 2800. In other words, we are required to analyze the underlying nature of the claim without regard to Congress' designation of that claim as core.

The aspect of *Granfinanciera* that we find difficult to decipher is its expression of the Court's view whether the bankruptcy court can hold jury trials in proceedings that are both legal and, at the same time, core pursuant to § 157(b). To be sure, the Court explicitly left that question open. *Id.* at 2802. But in its discussion of the questions it did address, there are several passages that can be construed as affecting the determination of that question.

One such passage is the discussion of the "public rights-private rights" dichotomy. To review, *Marathon* appeared to hold that Article I courts could adjudicate claims at the core of bankruptcy because such claims were public rights, and central to Congress' constitutional bankruptcy power. *Marathon*, *supra*, 458 U.S. at 71; *see also In re Kaiser*, 722 F.2d 1574, 1580 & n.2 (2 Cir. 1983). We say "appeared" only because *Granfinanciera* equivocated on that statement. 109 S. Ct. at 2797-98 & n.11. *Granfinanciera*, in turn, premised its holding that a fraudulent conveyance action carries a Seventh Amendment right to a jury trial, at least in part, on its conclusion that such action is a private right. *Id.* at 2795-98. If, therefore, the Supreme Court held that all adversary proceedings sounding in law are private rights of action, a determination that the instant action is legal would compel us to hold that the proceeding is not core.

Fortunately, we need not read *Granfinanciera* so broadly. That opinion also contains several passages indicating the Court's contemplation that its holding may result in jury trials in the bankruptcy court. For example, the Court stated that

> "one cannot easily say that 'the jury would be incompatible' with bankruptcy proceedings, in view of Congress' express provision for jury trials in certain actions arising out of bankruptcy litigation. And Justice White's claim that juries may serve usefully as checks only on the decisions of judges who enjoy life tenure overlooks the extent to which judges who are appointed for fixed terms may be beholden to Congress or executive officials, and thus ignores the potential for juries to exercise beneficial restraint on their decisions."

*Id.* at 2801 (citations omitted). As this passage indicates, Justice White's dissenting opinion understood the majority as leaving the door open for jury trials in bankruptcy and criticized the majority for doing so. *Id.* at 2810-12 (White, J., dissenting).

In view of the foregoing, we find that *Granfinanciera* does not foreclose the possibility of jury trials in the bankruptcy court. We therefore will analyze the question anew; addressing first whether the claims on the instant appeal are inherently legal, and second whether any statutory or constitutional provision bars the bankruptcy court from conducting jury trials.

(B)

In any action commenced in a federal court, "the right to a jury trial . . . is to be determined as a matter of federal law." *Simler* v. *Conner*, 372 U.S. 221, 222 (1963) (per curiam). Before we analyze the federal law applicable to the issues raised on the instant appeal, we will review briefly the relevant facts. The parties do not dispute that, due to the fire, ICSP's alleged obligation under the policy has matured. ICSP believes that Cooper defrauded it, and accordingly has sued in the state court to have the policy rescinded and to have its obligations declared void. Cooper then sued in the bankruptcy court for a declaration that the policy was still valid and that ICSP is liable for the damages Cooper claims. Alternatively, Cooper claims that if the policy is declared void, the fault lies with KM and K & C, rendering them liable for Cooper's losses.

We reject Cooper's contention that, merely because ICSP arguably is seeking rescission, the nature of the action is equitable. We agree with Professor Moore, who states that when

> "the insurer's liability under the policy has matured, the basic issues are legal. This is true whether the insurer sues to cancel the policy and the beneficiary counterclaims for recovery on the policy, or the beneficiary sues for recovery on the policy and the insurer defends and/or counterclaims for cancellation on the ground of fraud."

5 Moore's Federal Practice ¶ 38.23, at 38-200-01 (2d ed. 1988) (footnotes omitted); *see also American Life Ins. Co.* v. *Stewart*, 300 U.S. 203, 212 (1937); *Woods* v. *National Life and Accident Ins. Co.*, 347 F.2d 760, 767

(3 Cir. 1965); *Ettelson* v. *Metropolitan Life Ins. Co.*, 137 F.2d 62, 65 (3 Cir.), *cert. denied*, 320 U.S. 777 (1943).

That the claim may be construed as a request for a declaratory judgment does not change matters. It is settled law that in a declaratory action, "the nature of the underlying dispute determines whether a jury trial is available." *In re Petition of Rosenman & Colin*, 850 F.2d 57, 60 (2 Cir. 1988).

The argument of KM and K & C in favor of a jury trial is even more compelling. Cooper seeks damages from them for alleged negligence and malpractice. It is difficult to imagine a claim that is more inherently legal. Cooper makes little attempt to assert the contrary. The conclusion that "in an ordinary tort action . . . the right of trial by jury is guaranteed by the Constitution," *United States* v. *Fotopulos*, 180 F.2d 631, 634 (9 Cir. 1950), is so obvious that it hardly needs belaboring.

(C)

Since appellees have a right to a jury trial in this core proceeding, this brings us to the issue whether the bankruptcy court has statutory and constitutional authority to conduct such trials.

The relevant statutory provision, 28 U.S.C. § 1411 (1988), offers almost no guidance. The part of the statute applicable to voluntary petitions provides only that "this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.* at § 1411(a). This provision does not even make clear whether jury trials are

afforded for other actions, let alone the proper forum for those trials. Of course, *Granfinanciera* has clarified the former issue, holding that jury trials are to be afforded for all legal actions.

Despite the lack of a specific statutory provision, we nevertheless hold that the bankruptcy courts may conduct jury trials in core proceedings. This is the position taken by the majority of courts which have considered the issue. Gibson, *Jury Trials in Bankruptcy: Obeying the Commands of Article III and the Seventh Amendment*, 72 Minn. L. Rev. 967, 1027-34 (1988) (citing cases). The cases in support of this view are too numerous to cite; we mention only a few of the more comprehensive ones. *Dailey* v. *First Peoples Bank of N.J.*, 76 B.R. 963 (D.N.J. 1987); *In re McCormick*, 67 B.R. 838 (D. Nev. 1986); *In re Kroh*, 1989 WL 153045 (Bankr. W.D. Mo., Dec. 18, 1989); *In re Data Compass Corp.*, 92 B.R. 575 (Bankr. E.D.N.Y. 1988).

Our holding rests on two separate but related provisions. The first provision is 28 U.S.C. § 151 (1988), which states that "[e]ach bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit or proceeding." The second provision is § 157(b), which, as stated previously, gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. *Granfinanciera* teaches that such proceedings, if legal in nature, are subject to the Seventh Amendment, but that opinion does not alter Congress' intent that they be heard by a bankruptcy court with authority to issue final orders. Construing the Bankruptcy Code to allow jury trials in the bankruptcy court is the only way to reconcile these various concerns.

At present, there is no specific procedure in the Bankruptcy Rules providing for jury trials. For several years Rule 9015 prescribed a procedure for trials, but that rule was withdrawn in 1987 because bankruptcy courts were relying on it for substantive support for their right to conduct the trials. The Committee noted that " '[i]n the event the courts of appeals or the Supreme Court define a right to jury trial in any bankruptcy mattes [sic], a local rule in substantially the form of Rule 9015 can be adopted pending amendment of these rules.' " Gibson, *supra*, 72 Minn. L. Rev. at 1030 n.296 (quoting Committee Note to Abrogation of Bankr. R. 9015). In the interim, many courts have relied on local rules or Rule 38, the analogous Federal Rule of Civil Procedure. *E.g.*, *In re Kroh*, *supra*; *In re 222 Liberty Assocs.*, 99 B.R. 639, 643 (Bankr. E.D. Pa. 1989); *In re W.G.M.C., Inc.*, 96 B.R. 5, 6 (Bankr. D. Me. 1989); *In re Jackson*, 90 B.R. 126, 133 (Bankr. E.D. Pa. 1988).

(D)

The first possible constitutional hurdle to jury trials in the bankruptcy court is the Seventh Amendment, specifically the requirement that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. No reviewing court therefore may "redetermine facts found by the jury." *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 369 U.S. 355, 359 (1962). Thus, the Seventh Amendment may well render unconstitutional jury trials in non-consensual non-core proceedings, because of the requirement that findings of fact by the bankruptcy court be reviewed de novo by the district court. 28 U.S.C. § 157(c)(1). Dis-

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

*Petitioners,*

vs.

BEN COOPER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITIONERS' BRIEF IN REPLY

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April 29, 1991

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Docket No. 90-1280

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

# PETITIONERS' BRIEF IN REPLY

This brief is submitted in reply to the opposition brief filed by Ben Cooper, Inc. ("Cooper") dated April 16, 1991. Cooper initially submitted a letter to the Clerk of the Court waiving its right

to oppose the petition. A-61.[1] Following the Court's request for a brief in compliance with the Supreme Court Rules, A-62, the respondent chose to reverse its position and oppose the petition for certiorari. Cooper's arguments, however, are less compelling now than they were when it opposed the petitioners' first petition for certiorari, which was granted on June 28, 1990.

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[1] References to "A-" followed by a page number indicate reference to the Appendix attached hereto.

## POINT I

### THE ISSUES PRESENTED ARE RIPE FOR REVIEW

The issues presented here--the scope of the bankruptcy court's authority to hear and decide cases and its authority to conduct jury trials--are of national and constitutional importance. To suggest that a conflict on these issues among the circuits is somehow tolerable and should be allowed to percolate, as the respondent argues, Resp. Br. Pt. I, is to ignore the history of this case and the context in which the issues are now presented to the Court.

The percolation doctrine has been applied in cases where the Court has found the record to be "cloudy," or where the Court found it "desirable to have different aspects of an issue further illuminated by the lower courts." *State of Maryland v. Baltimore Radio Show*, 338

U.S. 912, 918 (1950). Here, there is nothing "cloudy" about the record and "further illumination" is neither necessary nor desirable. Some bankruptcy courts are conducting jury trials; others are not. Clear lines have been drawn and "percolation" would not serve to ripen the issues of constitutional import presented in this case. The respondent chooses to ignore, among other things, the fact that the issues in this case have had the opportunity to ripen during the past eleven months since the Court first granted certiorari.

The Court was satisfied that the questions presented by this case merited its attention when it originally granted certiorari on June 28, 1990. The questions presented have not changed. Indeed, the developments in the case law have served to underscore the divergent

views among the circuits. The Eighth Circuit in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449, 1450 (8th Cir. 1990), has held "that a bankruptcy judge lacks the statutory authority to conduct jury trials," and explicitly rejected the reasoning of the Second Circuit in this case. *Id.* at 1456. The Tenth Circuit in *Kaiser Steel Corp. v. Frates (In re Kaiser Steel Corp.)*, 911 F.2d 380 (10th Cir. 1990), endorsing the views of the Eighth Circuit, has also held that a bankruptcy court has no statutory authority to conduct jury trials. *Id.* at 392.

The respondent also implies that, because the holdings of these cases are based on analyses of the bankruptcy statute, Resp. Br. at 3-4, the conflict among the circuits is only statutory, not constitutional; thus the conflict would

not merit the Court's review. There were, however, constitutional overtones to both courts' rulings: The Eighth Circuit noted the "grave constitutional problems" implicit in the case, *United Missouri Bank*, 901 F.2d at 1450 n.1; and the Tenth Circuit found support for its holding in the seventh amendment's prohibition against the reexamination of factual findings, *Kaiser Steel*, 911 F.2d at 391.[2]

Moreover, conflict among the circuits' interpretations of a federal statutory scheme is a sufficient basis

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[2] Two other circuits have recently discussed the jury trial issue. The Third and Ninth Circuits have held that bankruptcy courts have no authority to conduct jury trials in non-core proceedings because of the 28 U.S.C. § 157(c)(1) requirement of *de novo* review. *Taxel v. Electronic Sports Research (In re Cinematronics, Inc.)*, 916 F.2d 1444, 1451 (9th Cir. 1990); *Beard v. Braunstein*, 914 F.2d 434, 443 (3d Cir. 1990). While the holdings of these cases are distinguishable from the holding of the Second Circuit in this action, the decisions demonstrate that the issues raised herein are indeed ripe for determination and require clarification from this Court.

for grant of a petition for certiorari. *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014, 1017 (1978) (White, J. dissenting) (a principal factor in considering petition for certiorari whether "the federal law, statutory *or* constitutional [is] being interpreted and enforced differently in different sections of the country")(emphasis supplied); *see also* Sup. Ct. R. 10.1(a).

## POINT II

## THE DECISION OF THE SECOND CIRCUIT BEGS THE COURT'S REVIEW

### A. The Respondent's Contention That The Decision Below Is Consistent With *Marathon* Ignores The Supreme Court's Rationale In That Case

The respondent's argument in Point II of its opposition brief merely tracks the reasoning of the court below, offering no further explanation for its conclusion that the controversy in this case is a "core" matter. Cooper argues that the decision below is "consistent" with this Court's pronouncement in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Resp. Br. at 7. Yet, respondent gives no consideration to the Court's rationale in *Marathon*, which established a dichotomy between the two types of claims related to and arising under bankruptcy pro-

ceedings (i.e., private rights as distinguished from rights core to the federal bankruptcy power).

In *Marathon*, the Court did not suggest that the timing of an underlying contract's formation or a claim arising therefrom would govern whether a matter is deemed core or non-core. While disputes arising from post-petition contracts may or may not have a greater impact on a bankruptcy estate than those arising from pre-petition contracts, *Marathon* and its progeny dictate that one examine the nature of a claim to determine whether it is core.

Cooper asserts that "the Second Circuit did in fact consider the state law nature of [this] dispute," Resp. Br. at 7 n.4, and nevertheless found it to be a core matter. Resp. Br. at 8. Had the Second Circuit actually considered the

nature of this dispute according to the *Marathon* rationale, however, it would have concluded that the matter at issue, involving ordinary state law contract claims, concerns only private rights.

In *Marathon*, the plurality emphasized that matters at the "core" of the debtor-creditor relationship "must be distinguished from the adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case." *Marathon*, 458 U.S. at 71. Thus, the Second Circuit's purely mechanical pre-petition/post-petition analysis is not what the Court intended.

Moreover, if the respondent is correct in its assertion that all post-petition activities fall within the bankruptcy court's core jurisdiction

under 28 U.S.C. § 157(b)(2)(A), Resp. Br. at 7-8, including actions involving "the right to recover contract damages," then the statute, too, is flawed. Clearly these significant issues call for clarification by the Court.

### B. The Respondent Fails To Acknowledge The Disparate Decisions Among The Courts On The Jury Trial Issue

The respondent baldly asserts that "[n]o further elaboration is necessary and the jury trial issue need not be reviewed" because "the Second Circuit came to the only conclusion consistent with the statutory scheme." Resp. Br. at 9-10. Here, too, the respondent merely tracks the analysis of the Court of Appeals on this issue, but fails to acknowledge that the courts--from the bankruptcy courts to the courts of

appeal--continue to disagree on the issue of whether jury trials can be conducted in bankruptcy courts. *See, e.g., In re Kaiser Steel Corp.*, 911 F.2d at 392 (no statutory authority for bankruptcy judges to conduct jury trials); *Clairmont Transfer Co. v. Rice, Rice, Gilbert & Marston (In re Clairmont Transfer Co.)*, 117 Bankr. 288, 290 (Bankr. W.D. Mich. 1990) (bankruptcy judges are empowered to conduct jury trials).

These cases and numerous other decisions rendered since the Court first granted certiorari in this matter demonstrate the need for a resolution of this most important question. *See generally* Sabino, *Jury Trials, Bankruptcy Judges, and Article III: The Constitutional Crisis of the Bankruptcy Court*, 21 Seton Hall L. Rev. 258 (1991).

Only a clear statement from the Court on the issue will prevent further misinterpretation and inconsistent application of the Bankruptcy Code.

## CONCLUSION

For the foregoing reasons a writ of certiorari should be granted.

Respectfully submitted,

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April 29, 1991

# APPENDIX

[LETTERHEAD OF LOWENTHAL, LANDAU, FISCHER, ZIEGLER & BRING, P.C.]

February 26, 1991

FEDERAL EXPRESS

Hon. Joseph F. Spaniol, Jr.
Clerk
United States Supreme court
Washington, D.c. 20543

Re: The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. v. Ben Cooper, Inc.

Dear Mr. Spaniol:

We are the attorneys for respondent Ben Cooper, Inc. Pursuant to Rule 15.5, Ben Cooper, Inc. waives its right to file opposition to the petition for certiorari.

Should the Court grant the petition, Ben Cooper, Inc. joins with the motion of the Solicitor General for submission of the briefs previously filed and for oral argument in the Court's April sitting.

Respectfully submitted,

LOWENTHAL, LANDAU, FISCHER, ZIEGLER & BRING, P.C.

By: /s/
Lawrence L. Ginsburg

LLG/con
[4173o]

cc: Mound, Cotton & Wollan
Ohrenstein & Brown
Office of the Solicitor General

[LETTERHEAD OF THE SUPREME COURT OF THE UNITED STATES, OFFICE OF THE CLERK]

March 18, 1991

Lawrence L. Ginsburg, Esquire
Lowenthal, Landau, et al.
250 Park Avenue
New York, NY 10177

Re: 90-1280 - Ins. Co. of Pennsylvania v. Ben Cooper, Inc.

Dear Mr. Ginsburg:

Although your office has waived the right to file a response to the petition for a writ of certiorari in the above case, the Court nevertheless has directed this office to request that a response be filed.

Forty printed copies of your response, together with proof of service thereof, should reach this office on or before April 17, 1991.

Your attention is directed to the provisions of Rule 33 of the rules of this Court. Please note that the color of the cover of your brief should be orange.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

William K. Suter
Clerk

cc: Stuart Cotton, Esquire

trict court review of final orders in *core* proceedings, however, is limited to the analogous review that courts of appeals have over district courts. 28 U.S.C. § 158 (1988); *In re Daniels-Head & Assocs.*, 819 F.2d 914, 918-19 (9 Cir. 1987). Since the jury verdict in a core proceeding is subject only to the traditional standards of appellate review, such proceeding does not violate the Seventh Amendment.

(E)

Finally, we reach the question whether jury trials in the bankruptcy court violate Article III of the Constitution. The essential predicate question, even more fundamental, is whether the statutory authority of bankruptcy judges to enter final judgments in core proceedings runs afoul of Article III. The parties did not raise this issue on appeal, limiting themselves to the question of the interpretation of § 157(b). The conclusion that core jurisdiction is constitutional, however, is implicit in our analysis in Section II of this opinion. That is particularly true in light of our holding that *Marathon*, a case decided under Article III, is to be distinguished from the instant appeal. We therefore assume for the sake of this appeal that § 157(b) passes muster under Article III. *Cf. Arnold Print Works*, *supra*, 815 F.2d at 169 (holding explicitly that Article III "permits a non-Article III bankruptcy court to adjudicate post-petition claims related to administration or liquidation of a debtor's estate because the claims are both historically and factually distinguishable from those at issue in *Marathon*").

If bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate

Article III. The primary purpose of this Article is to ensure a federal judiciary free from pressure from the other branches of government. *E.g.*, *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 848 (1986); *United States* v. *Will*, 449 U.S. 200, 218 (1980). If anything, jurors are less likely to feel pressure from the executive and legislative branches than are bankruptcy judges, who depend on the other branches for reappointment to office. *Granfinanciera*, *supra*, 109 S. Ct. at 2801. Additionally, the practice of jury trials in Article I courts has been upheld when the authority of the Article I judges does not otherwise run afoul of Article III. *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (local District of Columbia judges); *Collins* v. *Foreman*, 729 F.2d 108 (2 Cir.) (federal magistrates), *cert. denied*, 469 U.S. 870 (1984). We hold, therefore, that jury trials in core proceedings in the bankruptcy court do not violate Article III.

IV.

To summarize:

We hold that the adversary proceeding between Cooper and appellees is core within the meaning of § 157(b), and that the proceeding is properly before the bankruptcy court. We further hold that the issues underlying the proceeding are legal, entitling appellees to a jury trial, as they have demanded. Finally, finding no statutory or constitutional bar, we hold that the jury trial should be in the bankruptcy court.

Reversed and remanded.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
BEN COOPER, INC.,

Plaintiff,

v. M 47

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, KALVIN-MILLER INTERNATIONAL, INC., and KERWICK & CURRAN, INC.,
----------x

July 11, 1989
11:30 a.m.

Before:
HON. LOUIS L. STANTON
District Judge

ORAL DECISION

APPEARANCES

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VICTORIA A. STEWART

(In open court)

THE COURT: Based on the written submissions and the oral arguments of counsel, it is clear to me that the adversary proceeding commenced on May 9, 1989, by Ben Cooper, Inc., against the Insurance Company of the State of Pennsylvania, Kalvin-Miller International, Inc., and Kerwick & Curran, Inc., is not a core proceeding under 28 U.S. Code Section 157.

Core proceedings are those within bankruptcy cases which seek the creation, recognition, determination or adjudication of rights which do not exist independently from Title 11 or the bankruptcy case itself.

Stated differently, core proceedings are those which spring from the operation and application of the bankruptcy code itself. It is a term which is meant to encompass those proceedings which would not exist in the absence of the bankruptcy code.

In contrast, non-core or related proceedings are those which could have been brought in the district court or state court had there been no bankruptcy case filed. They exist irrespective of the fact of the bankruptcy.

The adversary proceeding here raises only state law issues, primarily whether the insurance company is liable for the losses sustained in a fire at the Rossville, Georgia plant, and if the insurance company is not liable, whether Kalvin-Miller or Kerwick & Curran are liable.

Now, of course, the outcome of that proceeding may have an economic impact on the consummation of the plan which has been approved by Judge Blackshear on April 4, but it does not follow that it is therefore a core proceeding under either Section 157(b)(2)(A) which refers to matters concerning the administration of the estate, or section 157(b)(2)(L) which concerns confirmations of plans, and to hold that it is a core proceeding under either of those clauses would read those clauses too broadly.

An action is not a core proceeding simply because its outcome can result in funds being brought into the estate. Rather, that connection makes it a related proceeding. In the Blue Point Carpet case the court pointed out that even where a breach of contract action is necessary to fund a reorganization,

treatment of the matter as a core proceeding is unjustified since otherwise even the Marathon case would have constituted a core proceeding, and order that construction the bankruptcy amendments of 1984 would be as unconstitutional as was the predecessor statute.

The proceeding not being a core proceeding, it cannot be rendered a core proceeding by any provisions of the plan. This raises the question whether the reference to the bankruptcy court should be withdrawn. Title 28 United States Code Section 157(d) states that a district court may withdraw in whole or in part any proceeding referred to under that section on timely motion of any party for cause shown.

The propriety of withdrawal in this case centers on the dispute whether the defendants are entitled to jury trial in the adversary proceeding. Ben Cooper's complaint in the adversary proceeding contains three counts. The first seeks a judgment that the policy issued by the insurance company is still in effect and that the insurance company is liable for Ben Cooper's losses sustained in the fire at the Rossville, Georgia plant. It seeks damages of $2 million and punitive damages of $5 million.

The second and third counts respectively argue that Kalvin Miller and Kerwick & Curran were negligent in the roles that they played in helping Ben Cooper obtain insurance. The defendant's answers contain jury demands.

The defendants are entitled to a jury trial with respect to at least some of

the debtor's claims and their affirmative defenses. The majority of cases hold that Congress did not intend that bankruptcy judges preside over jury trials in non-core proceedings, since the requirement of de novo review in a district court would be incompatible with the conduct of a jury trial in the bankruptcy court. Review in the district court would then have to be by a de novo jury trial, leading to a meaningless duplication.

The necessity of preserving the defendants' right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157(d). The reference being withdrawn, the question is whether the district court should abstain from hearing the matter and allow it to proceed in the state court.

The relevant statute, 28 United States Code Section 1334(c)(2), provides that the district court shall abstain from hearing a non-core proceeding based on a state law or a state law cause of action if an action has been commenced in the state court and that action can be timely adjudicated in a state forum of appropriate jurisdiction.

Section 1334(c)(1) permits a district court to abstain from hearing either a core or a non-core proceeding in the interests of justice or in the interests of comity with state courts or respect for state law.

As I have mentioned, the adversary proceeding here is a non-core proceeding which raises only state law issues. Pursuant to Judge Blackshear's orders, the parties have already conducted expedited discovery which pertains both

to the adversary proceeding and to the pending state court action. There has been no showing that timely adjudication is not available in the state court, and this court will abstain from hearing the adversary proceeding.

The final matter relates to the bankruptcy court's preliminary injunction which on May 24 prohibited the insurance company from canceling its policy with Ben Cooper and prosecuting its state court action.

In this circuit the standard for preliminary injunctive relief requires a showing of irreparable harm and either the likelihood of success upon the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

At this stage Ben Cooper's likelihood of success on the merits with respect to the insurance company's cancellation of its policy is at best a wide open question. There is no persuasive showing that it has a likelihood of success on the merits at this point. It may prevail or it may not. There are certainly sufficiently serious questions going to the merits to make them a fair ground for litigation.

As far as the balance of hardships is concerned, these tip in favor of the insurance company, not in favor of Ben Cooper. Unlike Judge Blackshear, I do not see how the insurance company's cancellation of its policy would jeopardize Ben Cooper's ability to pay out to its creditors. If the insurance company canceled the policy today, such an action should have no effect on Ben

Cooper's collecting $2 million or $5 million if it is entitled to do that from the insurance company for the January fire, nor would it increase otherwise, or decrease the assets available to Ben Cooper to pay its creditors.

However, by way of the injunction, the insurance company is presently being held to a risk which it says it never contracted to underwrite and for which it is receiving an inadequate premium. Ben Cooper argues that it will be difficult and may be impossible for it to obtain other insurance because of its financial situation as well as because of the insurance company's charges of deceit in the state court action. However, that is problematical. In any event, that situation has not been established as one

with which it is just to tax the insurance company.

Even if it is the case that no other company wishes to assume the Ben Cooper risk, that does not justify inflicting that risk on the insurance company merely because Ben Cooper has covenanted with its creditors that it will maintain insurance on its property. The obtaining of that insurance should be left to open market forces.

Accordingly, that portion of the bankruptcy court's order of May 24, 1989, preventing the insurance company from canceling its insurance policy is vacated. In light of my decision to abstain from hearing the non-core adversary proceeding commenced by Ben Cooper, the remaining portion of the May 24, 1989 order which enjoins the

insurance company from prosecuting the state court action is also vacated.

Is there anything further on this case?

MR. GINSBURG: Your Honor?

THE COURT: Yes.

MR. GINSBURG: In the event that Ben Cooper decides to appeal from this decision, assuming it is appealable, what would the form of request for a stay of your Honor's order -

THE COURT: I am sure it would be whatever the federal rules provide.

MR. GINSBURG: I would ask you now, then, preliminarily for a stay of your order to admit an emergency appeal to the Second Circuit.

THE COURT: I will grant you a 24-hour stay to explore your remedies and file whatever papers you wish to file.

MR. GINSBURG: Thank you. May I request a stay until the close of business tomorrow?

THE COURT: Yes.

(Proceedings adjourned)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
In the Matter of

| | Case No. |
|---|---|
| BEN COOPER INC., | 88 B 10484 |
| LIGHT MANUFACTURING CO., | 88 B 10547 |
| AIMWELL PRODUCTS, INC. | 88 B 10546 |
| BEN COOPER SALES, CORP. | 88 B 10770 |

Debtors.
----------x

June 15, 1989

United States Custom House
One Bowling Green
New York, New York 10004

s/c Debtor v. The Insurance Company of the State of Pa. --
Pretrial Conference
M/M for Determination of Core v. Non-Core

B E F O R E:

HON. CORNELIUS BLACKSHEAR,

Bankruptcy Judge.

* * *

**THE COURT:** Very well. Based upon the papers that this Court has read as well as the oral arguments, I think most parties can understand how I came to the

Bench this morning. I have not been convinced otherwise.

This Court's mind is still such that this is a core matter. It's core because of the following reasons, under 157(b)(2)(a), that this is a matter that is inextricably intertwined with the administration of the case. And it is because it was an issue that it was a provision under the plan that this case, under which this case was confirmed, that this was going to be a situation where the Debtor was going to maintain insurance on the property.

Furthermore, it deals somewhat, not quite as strong, with 157(b)(2)(1), the reason it doesn't, this Court expressly within the plan of consummation, retained jurisdiction, because of disputes such as this dispute. And that is a phrase that is normally put in the bankruptcy plan of

consummation, this Court is shocked when it is not, it's normally put in, so the Court can go on to substantive consummation and then thereby closing the case, which refers back to the administration of the case.

We do not need these cases lingering. And it's been the history of this Court, that the Court best equipped to handle these issues in an expedited basis is the Court that confirmed the case, that is familiar with the facts and backgrounds of the case, so that time can move on quickly to resolve the issue.

So for this reason, this Court finds that this is a core matter, it is a core matter for the reasons stated, and that other issues can await the District Court's determination as to whether or not it may wish to withdraw the reference, notwithstanding the fact this

Court has determined that it is a core matter.

**28 U.S.C. §157. Procedures**

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to --

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions

from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relation-

ship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims be tried in the district court in which the bankruptcy case is

pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer

a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

**28 U.S.C. § 158. Appeals**

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and

decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by a majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgements, orders, and decrees entered under subsections (a) and (b) of this section.

**28 U.S.C. § 1411. Jury trials**

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

FEB 25 1991
OFFICE OF THE CLERK

(2)

No. 90-1280

# In the Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

*v.*

BEN COOPER, INC., ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

KENNETH W. STARR
*Solicitor General*
STUART M. GERSON
*Assistant Attorney General*
JOHN G. ROBERTS, JR.
*Deputy Solicitor General*
STEPHEN J. MARZEN
*Assistant to the Solicitor General*
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## QUESTIONS PRESENTED

1. Whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A).

2. Whether adjudicating post-petition contractual disputes involving estate administration in the bankruptcy court is consistent with Article III and the Seventh Amendment.

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# In the Supreme Court of the United States

OCTOBER TERM, 1990

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No. 90-1280

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, ET AL., PETITIONERS

*v.*

BEN COOPER, INC., ET AL.

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the court of appeals holding that it has appellate jurisdiction and reinstating its previous opinion and judgment, Pet. App. A1-A6, is unreported. This Court's order vacating the court of appeals' previous judgment and remanding for consideration of the jurisdictional issue raised by the United States, Pet. App. A10-A11, is reported at 111 S. Ct. 425. The previous opinion of the court of appeals, Pet. App. A12-A33, is reported at 896 F.2d 1394. The opinions of the district court, Pet. App. A34-A47, and the bankruptcy court, Pet. App. A48-A51, are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on January 22, 1991. The petition for a writ of certiorari was

filed on February 12, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 151, 157, and 1411 of Title 28 of the United States Code are reproduced in an appendix to this brief.

## STATEMENT

Respondent Ben Cooper, Inc. (Cooper), is an importer and manufacturer of costumes and toys. Petitioners The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc., are an insurance company and an insurance brokerage corporation, respectively. After Cooper filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, petitioners contracted with the bankruptcy estate (through Cooper, as the debtor-in-possession) to insure the *res* of the estate. A fire at one of the estate's facilities led to a dispute over the insurance contract, and the insurance company brought a declaratory judgment action in New York state court to rescind the contract.

As we shall describe more fully below, the bankruptcy court, at Cooper's behest, stayed the state court proceedings. Cooper then filed its own adversary proceeding in the bankruptcy court seeking payment of its insurance claim and punitive damages. For their part, petitioners urged the district court to withdraw the proceeding from the bankruptcy court under 28 U.S.C. 157(d) on the grounds that it was not a core proceeding and that it was triable to a jury as of right. The district court agreed and withdrew the proceeding. In addition, the district court abstained in favor of the state court litigation and dissolved the bankruptcy court's injunction staying that litigation. The court of appeals reversed, holding that the proceedings were core and that the bankruptcy court could preside over a jury trial.

1. This matter commenced in April 1988 when Cooper filed its petition for reorganization in the United States District Court for the Southern District of New York. In October 1988, Cooper—as the debtor-in-possession of the bankruptcy estate—purchased a policy to insure the estate's commercial facilities.[1] The insurance was required under the reorganization plan then pending in the bankruptcy court. Petitioners were aware that the policy was sold to a debtor-in-possession, acting on behalf of a bankruptcy estate, and that the policy's subject matter constituted assets of that estate. Pet. App. A15, A23; see note 1, *supra*.

On January 6, 1989, a fire damaged one of the facilities of the bankruptcy estate. The insurer refused to pay the claim tendered by Cooper (as debtor-in-possession) on behalf of the estate. The insurer contended that the policy was invalid because the application had misrepresented the facility to be a warehouse when in fact it was a manufacturing plant. The insurer also asserted that it was not liable on the policy because the claim exaggerated the fire damage. Pet. App. A15-A16.

Subsequently, on April 4, 1989, the bankruptcy court confirmed the reorganization plan. Pet. App. A15. On that date, title to the estate's property was transferred from the estate to Cooper. See 11 U.S.C. 541(a), 1141.

On April 18, 1989, the insurer filed an action in New York state court to declare the policy invalid. On May 9, 1989, Cooper obtained an order from the bankruptcy court staying the state court proceedings. Soon thereafter, Cooper instituted an adversary proceeding in bankruptcy court claiming that the insurer was liable for payment of the insurance claim and that the insurance brokers were liable for

[1] The estate was being administered by the debtor-in-possession, as opposed to a trustee. See 11 U.S.C. 1107. Accordingly, petitioners corresponded with and received checks for the insurance premiums from "Ben Cooper, Inc., D.I.P."

negligence if the policy was held void. Petitioners opposed the bankruptcy court's jurisdiction, demanded a jury trial, and moved the district court to withdraw the proceedings from the bankruptcy court. Pet. App. A16-A17.

2. The district court remanded the proceeding to the bankruptcy court and instructed it to determine whether it was "core" or "non-core" under 28 U.S.C. 157. On remand, the bankruptcy court determined that the proceeding was core. Pet. App. A49-A51. Then, on petitioners' motion, the district court reexamined the matter and held that the proceeding was not core. Pet. App. A35-A38. The district court further held that petitioners were entitled to a jury trial. Pet. App. A39-A40. Believing that bankruptcy courts could not conduct jury trials in non-core proceedings, Pet. App. A39-A40, the district court withdrew the reference to the bankruptcy court:

> The necessity of preserving [petitioners'] right to a jury trial in this non-core proceeding constitutes good cause for withdrawal of the reference under 28 U.S. Code Section 157(d).

Pet. App. A40; accord Pet. App. A39. Rather than try the case itself, the district court abstained under 28 U.S.C. 1334(c)(1) and (2) in favor of the action that had been filed in New York state court and dissolved the bankruptcy court's injunction staying those actions. Pet. App. A40-A47.

3. Cooper appealed to the Second Circuit, which reversed. Pet. App. A12-A33. The court of appeals held that (1) the dispute was a core bankruptcy proceeding; (2) petitioners had a right to a jury trial; (3) the statute authorizes jury trials in bankruptcy courts; and (4) neither Article III nor the Seventh Amendment bars bankruptcy judges from presiding over such trials. First, the court of appeals held that the proceeding was within the core jurisdiction of the bankruptcy court because it was a "matter[] concerning the

administration of the estate" under 28 U.S.C. 157(b)(2)(A). Pet. App. A18. The court relied on several factors in determining that this insurance contract dispute was a core matter: the dispute involves a post-petition contract made with the debtor-in-possession, who serves as an officer of the bankruptcy court; the facility insured was an asset of the estate; insurance of the assets of the estate was part of the reorganization plan; and petitioners were aware that they were dealing with a debtor-in-possession and that the subject matter of the policy was an asset of the estate. Pet. App. A23. The court of appeals reasoned that Congress intended bankruptcy courts to adjudicate such disputes as core matters, despite the fact that they implicate state law, because they lie "at the heart of the administration of the bankrupt estate." Pet. App. A21. The court of appeals concluded that it "is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." Pet. App. A23.

Second, the court of appeals held that petitioners are entitled to a jury trial because their claims are legal in nature. Pet. App. A28-A29. The court of appeals explained that Cooper's dispute with the insurer alleged a breach of contract, and its dispute with the insurance brokers alleged negligence and malpractice. *Ibid.* These legal claims for money damages are, the court stated, triable to a jury under the Seventh Amendment. *Ibid.*

Third, the court of appeals held that bankruptcy courts have statutory authority to conduct jury trials in core proceedings. That holding rested on the combined effect of "two separate but related provisions." Pet. App. A30. The first provision, 28 U.S.C. 151, provides that bankruptcy courts "may exercise the authority conferred under this chapter with respect to any action." The second provision, 28 U.S.C. 157(b), states that bankruptcy courts have authority to conduct trials and issue final orders in core proceedings.

Reading the two provisions together, the court of appeals reasoned that Congress intended bankruptcy courts to enter final orders in all core proceedings, even those triable to a jury. Pet. App. A30.

Finally, the court of appeals concluded that this authority does not violate Article III of the Constitution or the Seventh Amendment. The court of appeals held that jury trials in bankruptcy court do not violate the Seventh Amendment, because no facts found by the jury would be reexamined by the district court, which exercises only appellate review over judgments in core bankruptcy proceedings. Pet. App. A31-A32. Nor would jury trials in bankruptcy court violate Article III, because "[i]f bankruptcy courts have the power to enter final judgments without violating Article III, it follows that jury verdicts in the bankruptcy courts do not violate Article III." Pet. App. A32-A33. Accordingly, the court of appeals reversed the district court's judgment and remanded the case to the bankruptcy court. Pet. App. A15.

4. Petitioners sought review in this Court, see petition for cert. in No. 89-1784, citing a conflict between the decision below and a decision of the Eighth Circuit holding that bankruptcy courts have no statutory authority to conduct jury trials, see *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (1990).[2] On June 28, 1990, this Court granted the petition for a writ of certiorari. 110 S. Ct. 3269.

On September 28, 1990, the United States moved to intervene as of right under 28 U.S.C. 2403 and to file a brief in intervention. The Court granted that motion. 111 S. Ct. 241 (1990). The brief filed by the United States raised and addressed a question concerning the jurisdiction of the court of appeals, concluding that that court had jurisdiction because the district court's order withdrawing the reference

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[2] The Eighth Circuit has since been joined by the Tenth Circuit. See *In re Kaiser Steel Corp.*, 911 F.2d 380 (1990).

to the bankruptcy court (which is ordinarily interlocutory) was appealable as part of the district court's decision abstaining in favor of the state court litigation under 28 U.S.C. 1334(c)(1) and (2). Although our brief observed that abstention decisions with respect to non-core matters are "not reviewable by appeal or otherwise," 28 U.S.C. 1334(c)(2), it explained that the district court's order was appealable in this case precisely because it did involve a core matter.

On November 13, 1990, the Court vacated the judgment of the court of appeals and remanded the case "for consideration of the jurisdictional issue raised by the United States." Pet. App. A11.

5. On November 27, 1990, the court of appeals directed the simultaneous filing of briefs on the jurisdictional issue. On January 22, 1991, the court of appeals "conclude[d] in the exercise of our independent judgment that we ha[ve] jurisdiction." Pet. App. A3. Although the parties "reach[ed] this result by different analyses," the court of appeals "agree[d] with the analysis of the Solicitor General." *Ibid.*; see Pet. App. A5-A6. The court then reinstated its previous opinion and judgment. Pet. App. at A6.

## DISCUSSION

1. This case presents the important questions, reserved by this Court in *Granfinanciera S.A.* v. *Nordberg*, 109 S. Ct. 2782, 2802 (1989), whether the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, authorizes non-Article III bankruptcy courts to conduct jury trials, and, if so, whether that authority is consistent with Article III and the Seventh Amendment. The Second Circuit in this case held that the Act permits bankruptcy judges to preside over jury trials and that such power is constitutional. In contrast, the Eighth and Tenth Circuits have held that bankruptcy judges have no statutory

authority to conduct jury trials. See *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d at 1454-1457 (8th Cir.); *In re Kaiser Steel Corp.*, 911 F.2d 380, 392 (10th Cir. 1990).

Prompt resolution of those questions is of the utmost importance to the efficient functioning of the bankruptcy court system. In 1978, after almost ten years of study and investigation, Congress enacted the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (repealed). The 1978 Act represented the first comprehensive revision of the bankruptcy system since 1898. Among other purposes, it was designed to reduce the serious delays in bankruptcy proceedings caused by the crowded dockets of non-bankruptcy courts. This Court held the 1978 Act's grant of jurisdiction to bankruptcy courts unconstitutional in *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In response, Congress enacted the legislation challenged in this case—the Bankruptcy Amendments and Federal Judgeship Act of 1984. Congress, in the 1984 Act, intended to conform the bankruptcy system to the requirements of Article III as determined by this Court. The public has a significant interest in this Court's early determination whether the revised bankruptcy system comports with constitutional requirements.

2. Before reaching those questions, the Court should determine whether post-petition contractual disputes involving estate administration are core proceedings under 28 U.S.C. 157(b)(2)(A), and whether such disputes are triable by jury as of right under the Seventh Amendment. The Court's answer to the questions of the bankruptcy court's statutory and constitutional authority to conduct jury trials may depend on whether post-petition contractual disputes are "core" or "non-core." The bankruptcy court has authority to "hear and determine" core matters, 28 U.S.C. 157(b)(1), but may only "submit proposed findings of fact

and conclusions of law to the district court" in non-core matters, unless the parties consent to the bankruptcy court's determination, 28 U.S.C. 157(c)(1) and (2). In addition, the need for this Court to pass on the bankruptcy court's statutory and constitutional authority to conduct jury trials would be obviated in this class of cases if the Court decided that post-petition contractual disputes do not give rise to a right to jury trial under the Seventh Amendment.

The Court issued a writ of certiorari in this case once before, remanding for consideration of the court of appeals' appellate jurisdiction. The court of appeals has now resolved that issue, and the case is ripe for this Court's review.[3]

3. In the interests of judicial economy and the prompt resolution of the important questions presented, we believe that the Court should grant the petition for certiorari, order that the case be considered on the briefs previously submitted, and set the case for argument during the Court's April sitting.[4] The briefs previously filed fully address both the merits and the jurisdictional issue, which has now been addressed and decided by the court of appeals. It is our understanding that all parties – petitioners and respondent Ben Cooper, Inc., in addition to the United States – would agree to submitting this case for decision on that basis if the Court is inclined to hear the case this Term.

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[3] For the reasons stated in the government's brief on the merits in this Court in *Insurance Company of the State of Pennsylvania* v. *Ben Cooper, Inc.*, No. 89-1784 (at 9-17), and in its brief on the jurisdictional issue in the Second Circuit, we believe that the Second Circuit had jurisdiction, and this Court has jurisdiction, if (but only if) this case falls within the core bankruptcy jurisdiction. As explained in our brief, if this Court determines that this case is a non-core proceeding, the court of appeals and, by extension, this Court would lack jurisdiction to reach the merits.

[4] We also believe that argument should be divided as the Court previously ordered in this case. See 111 S. Ct. 292 (1990).

## CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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FEBRUARY 1991

## APPENDIX

## STATUTORY PROVISIONS INVOLVED

1. 28 U.S.C. 151 provides:

In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.

2. 28 U.S.C. 157 provides:

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11 or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13, of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the estate or the adjustment of the debtor- creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding

shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

3. 28 U.S.C. 1411 provides:

(a) Except as provided in subsection (b) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim.

(b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury.

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No. 90-1280

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

*Petitioners,*

vs.

BEN COOPER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

No. 90-1280

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

*Petitioners,*

VS.

BEN COOPER, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari submitted by The Insurance Company of the State of Pennsylvania and Kerwick & Curran, Inc. does not provide a sufficient basis for this Court to exercise its discretionary jurisdiction. The issues raised have not been adequately explored by the lower federal courts and should be allowed to percolate, in order to permit a fuller development of these complicated issues.

In addition, a careful analysis of the decision of the Court of Appeals for the Second Circuit[1] demonstrates that it correctly held that the adversary proceeding commenced by respondent Ben Cooper, Inc. was a core proceeding and that the core proceeding should be referred to the bankruptcy court for a jury trial. The arguments cited in the petition are insufficient to require review.

## REASONS FOR DENYING THE WRIT

### POINT I

### THE ISSUES RAISED IN THE PETITION ARE NOT YET APPROPRIATE FOR REVIEW

Since the Second Circuit rendered the decision sought to be reviewed, two other circuit courts have ruled on one of the issues raised in the petition — the authority of bankruptcy judges to conduct jury trials. Although the Eighth Circuit in *In re United Missouri Bank of Kansas City, N.A.*, 901 F.2d 1449 (8th Cir. 1990) and the Tenth Circuit in *In re Kaiser Steel Corp.*, 911 F.2d 380 (10th Cir. 1990) each disagreed with the Second Circuit's holding that bankruptcy judges have the authority to conduct jury trials, only the Second Circuit analyzed both the statutory and constitutional basis for such authority. Thus, in spite of this conflict, it is submitted that the issues raised should be permitted to percolate further before this Court issues a definitive ruling.

The benefits of percolation have long been recognized as a reason for denying certiorari. As Justice Frankfurter stated

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[1] The decision of the Second Circuit is reported at 896 F.2d 1394 (2d Cir. 1990), and is reprinted in the appendix to the petition at A-12.

in *State of Maryland v. Baltimore Radio Show*, 338 U.S. 912, 918 (1950): "A case may raise an important question but the record may be cloudy. It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time for ripening."

Professors Estreicher and Sexton, in a study of the Supreme Court's responsibilities, explained the advantages of percolation:

> ... Disagreements in the lower courts facilitate percolation — the independent evaluation of a legal issue by different courts. The process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule. The Supreme Court, when it decides a fully percolated issue, has the benefit of the experience of these lower courts.

Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 716 (1984). *See also* Baker, *A Practical Guide to Certiorari*, 33 Cath. Univ. L. Rev. 611, 618 (1984) ("Each additional decision may shed new light on the way the issue should be analyzed. While it makes for temporary uncertainty, this process of percolation is ultimately good for the law."); R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice*, n. at 199 (6th ed. 1986) ("In some cases the Justices may feel that the time is not ripe for the Court to resolve a conflict, preferring to await further litigation that might produce a consensus or a satisfactory majority view among the lower courts.").

Further percolation is especially appropriate in this case. As stated previously, neither the Eighth Circuit nor the Tenth Circuit addressed the constitutional basis for the conduct of jury trials by bankruptcy judges, relying solely on their belief that bankruptcy judges lacked the statutory authority to conduct jury trials. Only the Second Circuit explored both the

statutory and constitutional basis for a bankruptcy judge's authority to conduct jury trials. Thus, the conflict among the Second, Eighth and Tenth Circuits is limited to one aspect of one of the issues presented for review (the other examples cited by petitioners are all lower court cases). This Court should permit additional percolation of this complex issue so that, when a binding national ruling is made, this Court has the benefit of more fully developed views among the circuits.[2]

With respect to the other issue sought to be reviewed — the Second Circuit's determination that the adversary proceeding is core — the other circuit-level cases relied upon in the petition are readily distinguishable and do not reflect a true conflict among the circuits. As the Second Circuit noted, the Ninth Circuit's decision in *Piombo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986) was based on a pre-petition contract claim unlike the post-petition claim in this case. Similarly, *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987), though involving post-petition activities (the issuance of stock), did not involve a contract knowingly entered into with a debtor-in-possession, which was required to maintain proper insurance under its proposed plan of reorganization. Whereas the effect on administration of the estate may not have been clear in *Wood*, the effect on estate administration in the case at bar was very clear.

Contrary to petitioners' argument (p.28), the nature of the underlying dispute cannot be considered in a vacuum; the

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[2] In fact, were the Court to grant certiorari and find that the Second Circuit was incorrect on the core/noncore issue, it would not be necessary for the Court to even address the conflict among the Second, Eighth and Tenth Circuits.

effect of the dispute on administration of the estate must be considered. Moreover, the Second Circuit's finding is arguably consistent with *Wood* since, as a post-petition claim, this proceeding could not have arisen *except* in the context of a bankruptcy case.

Of course, the mere presence of a conflict among the circuits is not determinative. Although the Court usually does not state its reasons for denying certiorari, there are numerous examples of a denial of certiorari despite a conflict among circuit courts. *See, e.g., Chelsea House Publishers v. Nicholstone Book Bindery, Inc.*, 455 U.S. 994 (1982); *Kamberos v. GTE Automatic Electric, Inc.*, 454 U.S. 1060 (1981); *Brown Transport Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting) (citing seven examples of cases on a particular conference calendar in which certiorari was denied despite a conflict among the circuits); *U.S. v. Mayes*, 431 U.S. 924 (1977); *Greco v. Orange Memorial Hospital Corp.*, 423 U.S. 1000 (1975). Even during the current term, the Court has denied certiorari despite the presence of a conflict. *See Pryb v. U.S.*, 59 U.S.L.W. 3292 (Oct. 15, 1990); *Teel v. Tennessee*, 59 U.S.L.W. 3404 (Dec. 3, 1990).

Clearly, not every conflict is intolerable. In fact, Professors Estreicher and Sexton suggest that only certain conflicts are of an intolerable nature:

> For example, an intolerable conflict occurs when litigants are able to exploit conflicts affirmatively through forum shopping, or when the planning of primary behavior is thwarted by the absence of a nationally binding rule. Disuniformity in the law becomes intolerable when litigants are able to bring themselves under radically different legal regimes

> through forum choice or are unable to readily adjust their affairs to the law's divergent commands.

Estreicher & Sexton, *supra*, at 725.[3]

Here, the forum shopping and planning concerns raised by Professors Estreicher and Sexton are not present. The choice of a bankruptcy forum is usually severely limited and it is highly unlikely, despite the arguments raised by petitioners, that any entity would be hampered in its planning by disagreement among the circuits concerning the core/noncore jurisdiction of bankruptcy courts or their authority to conduct jury trials.

As Justice Stevens stated to the American Judicature Society in 1982:

> ... the existence of differing rules of law in different sections of our great country is not always an intolerable evil . . . . It would be better, of course, if federal law could be applied uniformly in all federal courts, but experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process. The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result.

Stevens, *Some thoughts on judicial restraint*, 66 Judicature 177, 183 (1982).

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[3] Though Professors Estreicher and Sexton believe that a tolerable conflict may become intolerable once three circuits have addressed the issue, they also agree that "(a)ppropriate percolation often requires consideration by more than three courts." *Id.*, at 727. In this case, where only one of three courts has fully explored the issue, further percolation would be beneficial.

The judicial restraint urged by Justice Stevens is particularly appropriate here.

## POINT II

## THE DECISION OF THE SECOND CIRCUIT WAS CORRECT AND NEED NOT BE REVIEWED

### A. *The Second Circuit Correctly Held That a Bankruptcy Court Has Core Jurisdiction Over State Law Claims Involving a Post-Petition Contract*

After reviewing this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as well as the statutory framework contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), the Second Circuit held that the bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over state law contract claims when the contract was entered into post-petition. This holding is fully consistent with *Marathon* and the resulting statutory scheme.

In finding the adversary proceeding to be a "core" proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) — administration of the estate — the Second Circuit recognized the crucial difference between a dispute arising before the filing of the bankruptcy petition and a dispute arising after the filing of the petition, and determined that post-petition activities must be analyzed differently from pre-petition activities.[4]

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[4] Contrary to petitioners' statement, the Second Circuit did in fact consider the state law nature of the underlying dispute. Of course, the fact

*(Footnote continued)*

In the case at bar, the Second Circuit noted that the facility at which the fire took place was an asset of the estate; the debtor's plan of reorganization expressly required that the debtor maintain adequate insurance; the confirmation of the plan was premised on the maintenance of adequate insurance; and the appellees (petitioners) were fully aware that they were dealing with a debtor (A-23). Under these circumstances, the Second Circuit found that "(i)t is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." (A-23)

Contrary to petitioners' argument, there is nothing arbitrary about the test applied by the Second Circuit. A debtor-in-possession is an entity created by the bankruptcy laws. It is hardly arbitrary to hold that those who *knowingly* contract with a debtor-in-possession be held accountable before the court charged with protecting the debtor. Indeed, this is the only holding consistent with the statutory scheme.

The Second Circuit's holding is also consistent with this Court's decision in *Marathon*. The Court in *Marathon* held that Congress could grant bankruptcy courts the right to issue final orders in actions that were at the "core of the federal bankruptcy power," but not in those actions which involved merely "state-created private rights". *Id.*, 458 U.S. at 71. The dispute in *Marathon* arose pre-petition; thus, the holding in *Marathon* is entirely consistent with the holding of the Second Circuit. *See, e.g., Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165, 166 (1st Cir. 1987) ("In our view, the matter of timing and the relation to judicial administration of the bankrupt's estate make a critical

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that the adversary proceeding involves state law issues is, by statute, not determinative. *See* 28 U.S.C. § 157(b)(3).

constitutional difference between *Marathon* and the present case.").

A pre-petition cause of action fits more readily within the Court's description of "private" rights. However, once the bankruptcy petition is filed, post-petition contracts fit squarely within the core of the federal bankruptcy power which, in this case, concerns the administration of the estate.

In holding that a post-petition contract is an essential part of estate administration, the Court below was merely acknowledging the intent of Congress in enacting BAFJA — to ensure that proceedings "core" to the debtor's rehabilitation be determined by the bankruptcy court. This holding should not be disturbed.

B. *The Second Circuit Correctly Ruled That a Bankruptcy Court May Conduct a Jury Trial in Core Proceedings*

In ruling that a bankruptcy court may hold a jury trial in a core proceeding, the Second Circuit came to the only conclusion consistent with the statutory scheme.[5]

In *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 109 S.Ct. 2782 (1989), this Court held that Congress could not eliminate a party's Seventh Amendment right to a jury trial. *Id.*, 109 S.Ct. at 2800. However, the Court found it unnecessary to explicitly rule on the jury trial issue. *Id.*, 109

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[5] Indeed, the conduct of jury trials within bankruptcy proceedings is appropriate for sound policy reasons and is consistent with the primary goals of the federal bankruptcy system. Removing proceedings involving jury trials from the bankruptcy courts would not only bifurcate and delay the resolution of bankruptcy reorganizations but would also overwhelm an already overcrowded district court system.

S.Ct. at 2802. Despite petitioners' arguments, the fact that this Court left open the jury trial question in *Granfinanciera* does not compel the Court to answer it now.

Since *Granfinanciera* did not decide the issue, the Second Circuit examined the statutory and constitutional authority for jury trials in bankruptcy court.

Finding little guidance in the only statute which explicitly addresses jury trials (28 U.S.C. § 1411), the Court turned to the statutes granting jurisdiction to the bankruptcy court. 28 U.S.C. § 151 gives bankruptcy judges "the authority conferred under this chapter with respect to any action, suit or proceeding." 28 U.S.C. § 157(b) gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. The Second Circuit believed that the only way to reconcile these concerns, consistent with *Granfinanciera*, was to permit the bankruptcy court to conduct jury trials.

Next, the Second Circuit turned to the Constitution. The Court found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutory provisions do not require *de novo* review of determinations in core proceedings. Contrary to petitioners' statement (p.36), the Second Circuit never acknowledged a Seventh Amendment problem with respect to *core* proceedings, but only with respect to *non-core* proceedings (A-31).

As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, jury verdicts likewise would not be violative of Article III.

No further elaboration is necessary and the jury trial issue need not be reviewed.

## CONCLUSION

For the foregoing reasons, the petition should be denied.

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Respectfully submitted,

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